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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 220

JOHN JOHNSON, PETITIONER,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 22, 1928

CERTIORARI GRANTED OCTOBER 8, 1928

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

WRIT OF ERROR

THE UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

The President of the United States of America to Honorable Judges of the District Court of the United States for the Eastern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and orders, of a plea which is in the said District Court, before you, or some of you, between John Johnson, plaintiff, and the United States Shipping Board Emergency Fleet Corporation, defendant, a manifest error hath happened, to the great damage of the said John Johnson, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same at the Court Rooms of the said Circuit Court, in the said Circuit, on the 20th day of July, 1927, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, shall be done.

[fol. 2] Witness the Honorable William Howard Taft, Chief Justice of the United States, this 20th day of June, in the year of Our Lord one thousand nine hundred and

twenty-seven, and in the one hundred and fifty-first year of the independence of the United States of America.

Percy G. B. Gilkes, Clerk of the District Court of United States, Eastern District of New York. (Seal.)

Dated June 20, 1927.

The foregoing writ is hereby allowed.

Marcus B. Campbell, United States District Judge.

[fol. 3] In Supreme Court of New York, County of Richmond

John Johnson, Plaintiff,

against

United States Shipping Board Emergency Fleet Corporation, Defendant

Summons

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated March 29th, 1923.

Silas B. Axtell, Attorney for Plaintiff. Office and Post Office address: Eleven Moore Street, Borough of Manhattan, City of New York.

[fol. 4] In Supreme Court of New York

[Title omitted]

Complaint

Plaintiff complaining, alleges:

First. Upon information and belief, the defendant, United States Shipping Board Emergency Fleet Corpora-

tion, is a foreign corporation created under the laws of the District of Columbia, having an office and place of business in the Borough of Manhattan, City of New York.

Second. Upon information and belief, the defendant owned, operated, managed, and controlled an American merchant vessel known as the S. S. "Jacksonville."

Third. That on or about the 1st of August, 1920, the Steamship "Jacksonville" was lying at the port of Jacksonville, Florida. That on or about that day, the plaintiff was invited by the boatswain of the Steamship "Jacksonville" to go on board the said vessel in order to procure or attempt to procure employment as a member of the crew of that vessel.

Fourth. That while leaving the said vessel after having been thereon as aforesaid, and as plaintiff was going [fol. 5] ashore, and as he was crossing a gang-plank from the Steamship "Jacksonville" which gang-plank had not been made secure and which was carelessly and negligently permitted to remain insecure and unsafe, he was suddenly without any notice or warning, thrown from the said gang-plank into the water alongside of the Steamship "Jacksonville," whereby he sustained severe, serious, and permanent injuries.

Fifth. That plaintiff thereby became sick, sore, lamed, and disabled; has been and will be confined to his home and bed; has suffered and still suffers great pain; has been and will be prevented from working; has lost and will have to lose large sums of money which he otherwise would have earned; has paid out and will have to pay out large sums of money for medical and surgical attendance, for medicines, and for his maintenance and cure, all to his damage in the sum of $50,000.

Sixth. Upon information and belief, that said injuries were caused by reason of the negligence of the defendant, of the officers and seamen in command of the said vessel, and of other employees on board the said vessel; and by reason of the defective and improper condition of the gangway.

Wherefore plaintiff demands judgment in the sum of $50,000, with costs.

Silas B. Axtell, Attorney for Plaintiff. Office & P. O. address: Eleven Moore Street, New York City.

[fol. 6] *Duly sworn to by Silas B. Axtell. Jurat omitted in printing.*

[fol. 7] IN UNITED STATES DISTRICT COURT

JOHN JOHNSON, Plaintiff,

against

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant

ANSWER

The defendant, United States Shipping Board Emergency Fleet Corporation, by Ralph C. Greene, United States Attorney, Edgar G. Wandless of Counsel, answers the complaint herein, and says:

First. That it denies each and every allegation contained in Paragraph "Second" of the complaint herein.

Second. That it denies upon information and belief the allegations contained in Paragraphs "Third", "Fourth", "Fifth", "Sixth" of the complaint herein.

For a first and complete defense this defendant, upon information and belief, alleges:

Third. That it repeats and reiterates each and every admission, allegation and denial contained in Paragraphs "First" and "Second" inclusive of this answer, and alleges:

[fol. 8] Fourth. That on or about the 1st day of August, 1920, the Steamship "Jacksonville" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America, and that this action is in effect a suit against the United States of America, and whatever

rights, if any, the plaintiff may have by reason of the facts alleged in the complaint herein arose out of, and are founded exclusively upon the Constitution and Laws of the United States of America, and particularly the Act of Congress approved March 9, 1920, authorizing suits against the United States of America in Admiralty, which Act the defendant, United States Shipping Board Emergency Fleet Corporation, pleads in bar of the plaintiff's recovery in this action.

For a second and complete defense this defendant, upon information and belief, alleges:

Fifth. That it repeats and reiterates each and every admission, allegation and denial contained in Paragraphs "First" to "Fourth" inclusive of this answer, and alleges:

Sixth. That on the 1st day of August, 1920, and at all times mentioned in the complaint herein the Steamship "Jacksonville" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America; that the defendant, United States Shipping Board Emergency Fleet Corporation, did not, on the 1st day of August, 1920, nor at any time prior or subsequent to that [fol. 9] date, own or control under charter the said Steamship "Jacksonville," referred to in the complaint herein.

For a third and complete defense this defendant, upon information and belief, alleges:

Seventh. That it repeats and reiterates each and every admission, allegation and denial contained in Paragraphs "First" to "Sixth" inclusive of this answer, and alleges:

Eighth. That at all the times mentioned in the complaint the Steamship "Jacksonville" was fully provided with proper equipment, appliances, gang planks and safety devices; that the said equipment, appliances, gang planks and safety devices were all in proper repair and in good seaworthy condition; that the gang planks were properly and securely fastened and fixed and were in all respects safe, and if any injury was incurred by plaintiff at the time and place, or on the occasion mentioned in the com-

plaint, such injury was caused in whole or in part or was contributed to by negligence and want of care on the part of the plaintiff and was due to an open or obvious risk assumed by him in the business in which he was engaged, or in his coming on board the said Steamship "Jacksonville," and without any fault or negligence on the part of the Steamship "Jacksonville," its owners, officers or crew, or any one for whom they may have been responsible.

For a fourth and complete defense this defendant, upon information and belief, alleges:

Ninth. That it repeats and reiterates each and every ad-[fol. 10] mission, allegation and denial contained in Paragraphs "First" to "Eighth" inclusive of this answer, and alleges:

Tenth. That under the provisions of both the Suits in Admiralty Act, approved March 9, 1920, and the Merchant Marine Act, approved June 5, 1920, actions thereunder must be begun within a period not greater than two years prior to the commencement of the action; that the claim of the plaintiff herein is therefore barred, as it appears upon the facts of the complaint that the cause of action arose more than two years prior to the beginning of the action, to wit, on the 1st day of August, 1920, and that the action was not begun until April 6, 1923, at which time, the summons and complaint were served; all of which is pleaded as a bar to this action.

Wherefore defendant, United States Shipping Board Emergency Fleet Corporation, demands judgment dismissing the complaint, with costs.

Ralph C. Greene, U. S. Attorney. Edgar G. Wandless, of Counsel, Attorney for Defendant. Office & P. O. address: 45 Broadway, Borough of Manhattan, City of New York.

To Silas B. Axtell, Esq., Attorney for Plaintiff. Office & P. O. address: 11 Moore Street, City of New York.

[fol. 11] *Duly sworn to by E. A. Brennan. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT

JOHN JOHNSON, Plaintiff,

against

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant

JUDGMENT

The above entitled action having been duly tried before the Honorable Marcus B. Campbell, District Judge, and a jury in the District Court held in and for the Eastern District of New York, on the 25th, 26th, and 28th of March, 1927, and the jury having rendered a verdict in favor of the defendant and against the plaintiff on the 28th day of March, 1927, it is now, on motion of William A. De Grott, United States Attorney, Edgar G. Wandless, of Counsel.

Ordered, adjudged and decreed that the defendant United States Shipping Board Emergency Fleet Corporation recover of the plaintiff John Johnson the sum of $25, costs as taxed, and that the plaintiff have execution therefor.

Judgment entered this 18th day of April, 1927.

By the Court.

Percy G. B. Gilkes, Clerk, by J. G. Cochran, Deputy Clerk.

[fol. 13] IN UNITED STATES DISTRICT COURT

Bill of Exceptions

[Title omitted]

Before Hon. Marcus B. Campbell, U. S. D. J., and a Jury

Brooklyn, N. Y., March 25, 1927.

APPEARANCES OF COUNSEL

Silas B. Axtell, Esq., for plaintiff.

William A. DeGroot, Esq., for the defendant; by Mr. Cunningham.

Mr. Axtell made an opening statement to the jury, in the course of which Mr. Cunningham made the following statement:

Mr. Cunningham: This cigar box model is purely for the purpose of illustration, to give a picture of these ships, and not with the idea of conveying to their minds it is the condition on the ship.

The Court: This is only illustrative of what Mr. Axtell says he will prove.

Mr. Axtell: Yes, to aid us in demonstrating, and save a lot of talk.

[fol. 14] Mr. Axtell continued his opening, in the course of which Mr. Cunningham took the following objection:

Mr. Cunningham: I object to the statement the boatswain had authority to hire men and approve them. That is outside of the testimony.

The Court: Keep to the testimony.

Mr. Cunningham then made his opening statement to the jury, in the course of which Mr. Axtell made the following objection:

Mr. Axtell: I object to counsel's statement that plaintiff was not entitled to hospitalization in a Government hospital.

Mr. Cunningham: Because on the statement of Mr. Axtell he was not a seaman when he sustained the injuries.

The Court (to the jury): You take the law from me when I give it to you. You can hear what the attorneys say about the law, but I will tell you what the law is.

John Johnson, the plaintiff, called as a witness in his own behalf, being duly sworn testified as follows:

Direct examination.

By Mr. Axtell:

Q. How old are you?
A. 55 last 14th of August.
Q. What has been your occupation most of your life?
A. Seaman, boatswain.

Q. Are you a citizen of the United States?
A. Yes, sir.
Q. How long have you been a citizen?
A. Since 1920.
[fol. 15] Q. Where were you born?
A. Finland.
Q. Have you ever acted as boatswain on a ship?
A. Yes, about seven days before I was hurt I was on the S. S. "Standard Oil."
Q. As boatswain?
A. Yes, in the Gulf Trade.
Q. Have you been an ordinary seaman?
A. Yes, on square riggers.
Q. Have you ever worked as carpenter on a ship?
A. Yes, sir, on the "Swanson," Windsor, Nova Scotia.
Q. Do you remember the 1st of August, 1920?
A. Yes, sir.
Q. Where were you that day?
A. Sam's Hotel, East Bay Street, Jacksonville, Florida, until 4 o'clock.
Q. What happened then?
A. The boatswain of the Jacksonville came to the room where I was laying down and asked me to go down and see the chief officer, there was a man wanted on board, a carpenter or handyman. I should go down and I would see him in the evening. He expected him on board. I went down with him, he paid my fare down on the car, passed the gate at the Shipping Board yard, two watchmen were just relieving one another at 6 o'clock, and one stayed a little over and the boatswain asked him if we could pass through. He answered yes. He asked what I wanted to go aboard for. He told him to see the chief officer for to get a job; he wanted a man in the morning.
Q. Go ahead with the story. I did not ask you to tell it, but so long as you started it so well, unless counsel objects, proceed and tell what happened up to the time you got hurt.
A. I went on board, up the gangplank of the "West Compo," across the deck, underneath the bridge, the after [fol. 16] part of the bridge on the midship deck or boat deck, went over the rail. There was no opening on the rail. It was an iron pipe railing.

Q. You went through that?

A. No, I stepped over it. There were two pipes. I put my foot on one pipe and went over the top one, over it. I walked down the gangplank on board the Jacksonville. It is easier to go down hill than up hill.

Q. You got down there?

A. Yes, the plank was almost steady when I went down. I seen it hanging in the rope. I did not take much notice. The second officer of the "Jacksonville" was sitting on a chair across the deck.

Q. What day of the week was this?

A. Sunday evening.

Q. What time did you get on the boat?

A. A quarter after seven.

Q. What time?

A. A quarter after six, I mean, in the evening.

Q. Was anybody with you when you went down the gangway?

A. The boatswain went ahead of me.

Q. How far ahead?

A. I judge 4 feet—he must have been all of 12 feet over the gangplank. We were the only ones on the gangplank at the time. The gangplank was 12 feet long, and the inside boat was 8 to 10 feet higher than the outside boat, which made the gangplank steep, so if she was resting on the deck she would have to be——

Q. When you got to the end of the plank what was there there to step on?

A. A wooden box, a grocery box.

Q. How big was it?

A. I judge 8 inches wide, a foot and a half long, and [fol. 17] about the same width, might be more.

Q. Did you say 8 inches?

A. Yes.

Q. Show us what you mean by 8 inches with your hands.

A. About so (indicating).

Q. That looks like 10 inches to me. Was that the heighth of the box or the width?

A. The width.

Q. How high was it on deck?

A. About a foot and a half.

Q. Show us a foot and a half with your hands, show us from the floor where your feet are on that box, show with your hand as high above the floor level as the box came. (Witness did so.)

Mr. Axtell: The floor of the witness box.
Mr. Axtell: That is about 15 inches.

Q. Are you talking of the level of the witness box?
A. From here (indicating).

Q. That height you would say the box was?
A. Yes, sir.
Q. You had no accident getting aboard the ship?
A. No.
Q. What did you do when you got aboard?
A. Crossed the deck, walked forward to the boatswain's room, the boatswain asked the second mate if the chief officer was on board. I understood him to say no. He said, "Come forward and wait a while until he comes on board so you can see him." It was a very hot day. I did not want to stay long. He said, "Wait a while and I will come ashore with you." I stayed there a little over half an hour; it was too hot in his room. I went in there and [fol. 18] could not stay there; it was over 100. Anyhow, in the month of August, the hot sun pouring on the iron decks, and no awnings——
Q. Were any arrangements made about working on the ship this time?
A. Only with the boatswain.
Q. What arrangement did you have with him?
A. He asked me to come aboard and see the chief officer.
Q. When?
A. That evening.
Q. After you got aboard and the chief officer was not there you waited a while?
A. Yes, to see if he would come aboard.
Q. Did he come?
A. No.
Q. Was an arrangement made with him?
A. The boatswain wanted me to stay aboard. I said, "It is too hot to sleep here. I have a hotel, it is nice and cold there, and I could not sleep here, it is too hot, and

furthermore, I have not my working clothes with me, so I could not start without going up in the morning, so I might as well go up there and sleep the night where I paid for the room."

Q. You started for shore?

A. Yes.

Q. Were you alone or with anybody when you started for shore?

A. I went alone.

Q. What time was that?

A. About a quarter to seven, I should judge.

Q. How long were you aboard the ship then?

A. A little over half an hour.

Q. Tell where you went after leaving the boatswain's room.

A. I crossed the well deck forward, walked along the well deck on the starboard side to amidships, went up 14 steps up to the bridge deck, walked along the bridge deck to [fol. 19] where the gangway was, stepped on the gangway, got half ways on it when it started wiggling like this, being steep, and it is harder to go up hill than down hill, the gangway started to wiggle; when I got to the middle I got around the stanchion this arm, it overbalanced me. I held with this arm as long as I could.

Mr. Axtell: Indicating the left arm.

A. (Continuing:) I held there until it broke. I heard it crack, and everything turned black from my eyes; I could not hold any more, I fell backward, my head struck in the rail, and there is nine stitches in the back of the head, the scalp was turned over my face, they pulled it over when I came to St. Luke's, they pulled it over. This jawbone was hanging over here, it was torn loose from both sides here, two holes here from the bolts of the "West Compo," it was bolts like that, rivet heads on the outside, square ones, and when I fell down between it tore this part, and tore my scalp over my face. I was unconscious. I had my senses until I struck the rail.

Q. When did you become conscious?

A. 9 o'clock I heard the nurse, Miss Jones, a Sister in St. Luke's, the doctor asked her what time it is, he is coming to now, and she said 9 o'clock.

Q. What happened then?

A. The doctor told her to give me chloroform or ether, whichever it was, and I heard no more before 10 o'clock; they were boring a hole in my knee-cap and putting some fluid in it.

Mr. Cunningham: I move to strike that out.

The Court: Strike out everything after 9 o'clock.

[fol. 20] Q. In the morning you came to at 10 o'clock?

A. Yes.

Q. What did you find to be your condition then?

A. I was sore all over, pain all over.

Q. Did you have any bandages on you?

A. Bandages all around my head.

Q. Where else did you have bandages?

A. The arm had two boards, and the hand was turned around, the front was on the back, and it was so until I came to Savannah.

Q. They left you over night?

A. It was so badly crossed they could do nothing with it. They put bandages on. They put boards on, and tied it up, and let it grow together, and they broke it afterward. The doctor at Jacksonville, he said he could not break it——

The Court: Strike out what somebody told him.

Q. You say they let it heal up there with your palm of your hand on the outside?

A. Yes.

Q. What hospital was this?

A. St. Luke's, Jacksonville.

Q. Is that a public hospital?

A. Public Health Service.

Q. How long were you in the hospital?

A. One month and 17 days.

Q. What hospital were you taken to?

A. Savannah, Georgia, Public Health Service Hospital.

Q. How long were you there?

A. Two years and a half.

Q. What did they do for you in these two hospitals, what operations or treatment did they give you?

A. Dr. Rogers and Major Miller, they operated on me.

[fol. 21] Q. At which hospital?

A. Savannah Hospital.

Q. That is the second one?

A. That is the first one. The first treatment was St. Luke's, was bandaging it up.

Q. You were there one month and seventeen days?

A. Yes, sir.

Q. Didn't they do any other operations on you?

A. No.

Q. Do anything to your knee?

A. Sewed my head and bored my knee.

Q. What do you mean, bored it?

A. It felt like boring a hole in it, he may have put a syringe in it and take it out, really more than I could see.

Q. Were you conscious or unconscious?

A. It was like a dream to me in bed.

Q. Did he give you gas?

A. No.

Q. Did he put a local pain killer in the knee?

A. Yes.

Q. You could see it?

A. I was laying high with my head, and I could look at it.

Q. He was doing something with instruments?

A. Yes, but he held his hand in front so I could not see it very well.

Q. Were you able to walk at that time?

A. Not for three weeks after, the leg was dead altogether.

Q. Were you able to move the leg?

A. No, it laid dead in the bed.

Q. Did they do anything to your arm at that hospital?

A. Bandaged it up tight.

Q. Did they take those boards off?

A. No.

Q. Left them on all the time—were you given any injections of morphine, or anything like that?

A. No, I would not take it. They may have given me first when I came to, that is more than I can say, but after I had my senses I did not take it. I never accepted; for an operation sometimes I had to take it.

[fol. 22] Q. Did you have pain during that time?

A. Yes.

Q. Where did you have pain?

A. The back of the head, down here (indicating); I could not breathe, my mouth was full of blood, so I was choking.

Q. How did you eat?

A. I did not eat anything.

Q. Didn't they give you liquid?

A. The first thing three days after they had a straw put in my mouth with beat-up raw eggs and milk, and poured it into me.

Q. Did you suck it through?

A. Very little.

Q. Did they pour it in?

A. They poured the glass running in high enough. I was sucking all I could to get it in.

Q. How long did that last?

A. Lasted three weeks.

Q. You finally were taken to Savannah, Georgia?

A. Yes.

Q. How did you get there?

A. By myself, with my arm in the sling.

Q. Were you able to move the leg then?

A. Yes, the leg came through three weeks after. I could walk on it a little and it got stronger and stronger every day, and I limped along the best I could.

Q. You left the hospital and went——

A. No, they said I had to be transferred. The Major said the quicker the operation would be performed the better it would be for me.

Q. You were in the marine ward at St. Luke's Hospital?

A. Yes, sir.

Q. Used for sailors?

A. Yes, sir.

[fol. 23] Q. As a seaman you had a discharge from an American vessel within seven days?

A. From the steamship "Dempsey."

Q. An American ship?

A. Yes.

Q. And as a seaman from that ship with that discharge do you know whether you were entitled to receive treatment at a marine hospital?

Mr. Cunningham: I object as incompetent, irrelevant and immaterial.

The Court: What has it to do with this case? He did not have a discharge from this ship. What do we care about it?

Mr. Axtell: My friend said he was not entitled to receive treatment at a hospital, as though that was part of his case.

The Court: He said he was not entitled to receive treatment because he was not connected with this ship.

Mr. Cunningham: He was not connected with any ship at the time of the accident.

The Court: What are we concerned about that for?

Mr. Cunningham: Simply he has received his maintenance and cure at the expense of the Government, and was not entitled to that.

The Court: He was not a sailor. You are not asking for maintenance and cure.

Mr. Axtell: I objected to his making the remark in the opening. He said this man was not entitled to go to a marine hospital.

The Court: I do not see what it has to do with it. You are not asking for maintenance and cure in this case. You are suing for indemnity, for damages he received, and [fol. 24] that is all he is suing for. What is the difference whether he is entitled to hospital care; you do not contend he is entitled to maintenance and cure under any conditions?

Mr. Axtell: No.

The Court: Then what difference does it make?

Q. You got to Savannah, Georgia?

A. Yes, sir.

Q. And entered that hospial?

A. Yes.

Q. And that was a United States Marine Hospital?

A. Yes.

Q. How did you get in there?

A. On the same permit as I had from the S. S. "Dempsey."

Q. In other words, you get it on your discharge from another American ship?

A. Yes, sir.

Q. Tell the jury what happened in this hospital as to treatment, operation, and so forth?

A. I had three operations there.

Q. Tell us about them.

A. The bones grew together. I waited one month and eleven days before they operated on me.

Q. What did they do then?

A. Operated on me.

Q. On which arm?

A. On this arm, the left arm, broke it again, and turned the hand around.

Q. How was your hand before that?

A. I do not remember. It was down like that (illustrating). It is a little yet; I cannot turn it yet without turning the body.

Q. Which way was it turned before; use the other hand to show us? A. This way (indicating).

[fol. 25] Q. With the thumb down or to your back?

A. Yes.

Q. Could you use the hand in the shape it was at that time?

A. No, I could not move the fingers or anything.

Q. They put you under ether when they had that operation?

A. Yes, the first time I was three and a half hours under ether, and the second time three hours.

Q. Did they operate twice on the same arm?

A. Yes, the scars show here.

Q. You have a scar?

A. Yes, sir.

Q. Will you take off your coat and roll up your sleeve?

(The witness did so and showed the scar on his arm.)

Q. Double your arm as much as you can.

(Witness did so.)

Q. Straighten it out as much as you can.

(Witness did so.)

Q. Now turn it around as much as you can.

(Witness did so.)

Q. Where is the scar you were telling about?

(Witness shows the scar.)

Mr. Axtell: It runs along from the wrist to the elbow.

A. And the other one goes there.

Q. What was the third operation at the hospital?

A. The fingers were grown fast together. They had me under ether three times to break them loose. Every time they grew together, the fingers grew stiff, and I could not move them at all.

Q. You mean your fingers became stiffened?

A. The joints in the fingers became stiff.

Q. How are your fingers now?

A. I can move them a little. I have not got power in them.

[fol. 26] Q. Can you double your fist up like I do mine?

A. No.

Q. Is that as little as you can double it up?

A. That is all.

Mr. Axtell: May it appear on the record the plaintiff cannot close his hand more than to have the fingers touch the thumb?

Q. Was any operation done to your jaw, do you know?

A. Sewed together, three stitches put in under the chin here.

Q. That was done in the first hospital?

A. Yes, the Major at St. Luke's bandaged it up and put it in place at the ears; and the nose was torn; and I think there was one stitch put in the nose.

Q. What other treatment did you receive at the hospital?

A. After I was there a year and a half I got stomach trouble and I got some medicine for the stomach; that is all the treatment I received, and I got well after it. I did not get well with their medicine, but I asked them for other medicine, which they refused me, and they gave me five grains of other medicine at last, and I got well. I got 56 inches around the waist, and everything turned black from my eyes.

Q. Did you get massaging or electric treatment of the arm?

A. Yes, I was going to Dr. Goren three months twice a week, and he made them operate on me again; he told them the arm was not grown together.

Q. He means the bones were not grown together?

A. Yes, sir.

Q. Who is Dr. Goren?

A. Osteopath.

Q. Savannah?

A. Yes, sir.

[fol. 27] Q. He was an outside practitioner?

A. Yes, sir.

Q. How long did you go to him?

A. Three months he was rubbing my arm.

Q. Gave you massages?

A. Yes.

Q. Did that improve you?

A. The shoulder blades were torn out of place, and he got them in place so I could lift the arm. I could not get them from the side, it was like that.

Q. When you left the hospital, what did you do? Where did you go when you left the hospital?

A. At Savannah?

Q. Yes.

A. To Baltimore No. 1.

Q. You were in the hospital there?

A. Yes, sir.

Q. How long were you there?

A. Five and a half months.

Q. What did they do for you there?

A. Did not do much for me.

Q. Altogether you were in hospitals how long?

A. Between two and three years; I do not remember.

Q. After you left the hospital at Baltimore where did you go?

A. Sailors' Snug Harbor.

Q. How long did you stay there?

A. Five months and a half.

Q. And then you left there to do what?

A. It was spring of the year and I felt a little better, and they needed a watchman at the Iron Works, Brooklyn.

Q. You got a job as watchman?

A. Yes, sir.

Q. Where was that yard at that time?

A. Pioneer and Emery Streets.

Q. How long did you have that job?

A. Ten months.

Q. Why did you leave that job?

A. It got in the hands of receivers and I got transferred. [fol. 28] When I got through there they put me on the dredge "Hurricane"; Moore & McCormick had a part in it; they were ship brokers for the "Hurricane"; they told me I could go there and stay there and live there.

Q. How long have you been there?

A. Two years in April.

Q. You have been in charge of the "Hurricane" all that time?

A. Been alone there most of the time. For one month we had a crew on board. She had been undergoing repairs, over $60,000 spent on her.

Mr. Cunningham: I object to that.

The Court: Strike it out.

Q. Is she a large boat?

Mr. Cunningham: I object.

The Court: What boat?

Mr. Axtell: The "Hurricane" he is working on.

The Court: What do we care about that?

Mr. Axtell: To show his general work and what he is able to do.

The Court: What difference does it make about the size of the vessel? Keep to the issue.

Q. What are your duties on the boat; what do you do? (No answer.)

By the Court:

Q. What work are you doing?

A. Now or before?

[fol. 29] By Mr. Axtell:

Q. Now.

A. Watchman.

Q. Do you have to do any physical work or labor?

A. No, I ain't able to.

Q. How is your leg now?

A. A little stronger than it was.

Q. What, if anything is wrong with your leg or knee now?

A. It bends backward about 2 inches more than it should.

Q. In other words, your knee is more double-jointed than it ought to be?

A. Yes, it bends to the side too.

Q. Did you have any treatment for that knee while in the hospital, aside from this one operation you have been telling about?

A. No.

Q. Was there anything wrong with the knee before that?

A. Yes, I have been having it broke once before.

Q. You had had it broken once before?

A. Yes, the knee.

Q. The same knee?

A. Yes, sir.

Q. What was its condition after the first accident and before the second accident?

A. Almost as strong as it was before I had it broke the first time.

Q. The first accident had not impaired its usefulness very much?

A. No.

Q. How does it compare now with the way it was before the accident?

A. Getting a little stronger all the time, the leg.

Q. Now as to your left arm, to what extent are you able to use that?

A. None at all.

Q. Have you any grip in your left hand?

A. No.

Q. Can you close it?

A. No.

[fol. 30] Q. Have you had any pain at all since you left the hospital?

A. Yes.

Q. Where?

A. In the arm and in the head.

Q. How much pain have you had in your head?

A. Sometimes I do not sleep nothing for three or four nights.

Q. Do you have as much pain now as you used to have?

A. No, it is a little better.

Q. You have been gradually getting better in that respect?

A. Yes, getting a little better right along.

Q. Do you feel better now than you did a year ago?

A. Yes, sir.

Q. Did you feel better a year ago than you did the year before that?

A. Yes, I got a little better right along.

Q. What year was it you left Sailors' Snug Harbor at Staten Island?

A. 1923, April 3rd.

Q. And you have been employed as watchman steadily ever since then?

A. With the same people, got transferred from one to the other.

Q. You have been steadily employed ever since then as watchman?

A. Yes, sir.

Q. How steadily had you been employed before you got hurt on this ship, the "Jacksonville"?

A. I will have to go too far back.

Q. As far as you went.

A. During the war I was discharged from one ship to another, not over ten days ashore.

Q. Have you worked steadily all your life?

A. Yes, except when I have been hurt and been in the hospital a couple of times.

Q. Did you ever have any other accident to your left arm?

A. I had an accident with the right hand and arm in 1906, and I was in the hospital six months with it.

[fol. 31] Q. Did you ever have anything with your left arm before this?

A. No.

Q. Was your left arm in good shape before this accident?
A. It was not hurt no time.
Q. Did you have an accident or injury to your head before this accident on the "Jacksonville"?
A. No.
Q. Had you had an injury to your jaw before the accident on the "Jacksonville"?
A. No.
Q. The injury to your jaw and head and your left arm and hand, is that all that happened to you on the "Jacksonville"?
A. Left arm, jaw, top of the head, arm, and the knee-cap.
Q. These X-rays show some injury to your nose.
A. I had that broke before.
Q. That was something else?
A. Yes.
Q. You had that before?
A. Yes, sir; it tore it a little more when I fell here.
Q. It did not break any bones?
A. It did not break any bones.
Q. Do you know how far it was from the deck of the "Jacksonville" down to the water line?
A. Amidships there?
Q. At the point where the gangway was.
A. 13 or 14 feet, I should judge. I did not measure it.
Q. Do you know whether there is a custom in American ships as to the hiring of men or the procuring of men for employment in the deck department, such as deckhands or carpenters by the boatswain of a ship?

Mr. Cunningham: Objected to on the ground this man is not competent to testify as to customs on ships.
The Court: I do not know whether he is qualified or not, [fol. 32] if you want to cross examine him.
Mr. Cunningham: I won't interrupt the examination.

Q. Did you hear the question?
A. Yes, sir.
Q. What is your answer to the question? Is there a custom?
A. It is a custom.

The Court: Do you understand what he means?
The Witness: Yes.

By the Court:

Q. He did not mean if it is done once in a while, or one person does it, or two or three people do it; he wants to know if there is an established custom, if it is a regular thing on American ships for the boatswain to hire men; the regular thing?

A. The chief officer, if he likes the boatswain, he generally lets him do it, get his own men.

By Mr. Axtell:

Q. How many ships have you been on?

A. I could not count half of them, or remember it.

Q. Tell us about how many.

Mr. Cunningham: I object to this on the ground that it is incompetent, irrelevant and immaterial, and does not run to the question. The question is how many ships he had been boatswain on to know the custom. He already testified he does not know anything about that.

The Court: I will let him testify how many ships he had been on.

[fol. 33] Q. How many ships have you been on?

A. I could not remember it now. I have been going to sea since 1889.

By the Court:

Q. How many times were you hired by the boatswain, and how many times——

A. In olden times we shipped in the commissary; schooners we shipped at the shipping master; in steamers at times the men go aboard and the boatswain hires them.

By Mr. Axtell:

Q. Do you know from your experience since 1889 at sea—you testified you have been ordinary seaman, able seaman, carpenter and boatswain constantly, and you have been on lots of ships; do you know whether there is a general custom on the part of boatswains to procure men for the deck department and take them to the mate for his approval to be hired?

A. That is a hard thing for me to answer any other way than the way I done so.

Q. Is your answer yes or no? Do you know whether there is such a custom?

A. Yes.

Q. What is the custom with regard to the boatswain getting men or procuring men for the mate?

A. The boatswain used to get them and take them to the chief officer and he hires them.

Q. What are the duties of boatswain on a ship?

A. To run the men.

Q. In what department?

A. In the deck department, with whatever is to be performed in ship's duties.

[fol. 34] Q. Is he a sort of foreman over the deck department men?

A. Yes.

Q. He carries out the orders of the first mate?

A. Yes, sir.

Q. Do you know of your knowledge whether the chief mate is known as the executive officer of a merchant ship?

A. Yes, sir.

Q. Do you know what I mean by executive officer?

A. In charge of everything.

The Court: Nobody raises any question about the chief officer being executive?

Mr. Cunningham: No.

The Court: They concede the chief mate is the executive officer?

Mr. Cunningham: Yes.

Mr. Axtell: And the boatswain is in charge of the deck department and carries out the orders?

Mr. Cunningham: I concede the boatswain is foreman, like the top sergeant is to the lieutenant.

Q. Going back to the scene of this accident, will you take this model and show us first where was the box when you came on the ship, the box you speak of?

A. Right here between the guy——

Q. If I make a mark here something like that, would that show in a general way where it was?

A. It was not as far this way as this way.

Q. You are not as far this way. I made a mark here. I will mark it A.

A. It is about the middle of the boat.

Q. About here?

A. Yes, sir.

Q. Mark that B, and it reached out this way how far?

A. Up to this guy.

[fol. 35] Q. Then these lines here which we will mark C—then the line B to C would indicate where the box came; is that right?

Mr. Cunningham: Let us have the testimony from the witness rather than you tell him.

The Court: Yes, let the witness tell. Ask questions and do not suggest answers.

Q. Will you take the pencil and show the jury where the box was on the deck of the "Jacksonville", make a square there? (Witness did so.)

Q. Now you have made a rectangle, and you say that indicates the position where the box was as you saw it when you came aboard?

A. As I stepped on it.

Q. Were the ends of the planks of the gangway resting on the box?

A. No, they might have been before, but they were lifted up about 4 feet above the box.

Q. How far above?

A. 4 inches. 4 feet, I say.

Q. Show us what is 4 inches, show with your fingers.

A. About that far (indicating).

Mr. Axtell: He is measuring about 4 inches, I should say, or 4½.

Q. Show us on the ruler—show us with your hand again what you said was the distance.

(The witness did so.)

Mr. Axtell: It shows 4⅛ or 4¼ inches.

Q. Just take the model and use this pencil if you wish, and show how you proceeded up the plank, and just what [fol. 36] happened to you, and how you got your arm caught.

A. I stepped on the box with one foot. I climbed up the ladder here, 12 steps—

Q. There was a ladder to get to the midship deck?

A. Yes, from the forward deck. I walked along the starboard side and climed up the iron ladder to the midship deck. There were rails on the side to take hold of, both sides. I walked up there, walked to this box, stepped on the box, got up this gangway to here, then it started wiggling like this.

Q. Mark a mark at the point where you got to.

A. Where the stanchion is amidships.

Q. Opposite the middle stanchion?

A. Yes.

Mr. Axtell: He made a mark.

Q. What happened?

A. I was standing there, and while holding on I tried to get up. It is harder to get up hill than down hill always. I tried to get up, it started wiggling more and more, so I got my one hand here on the rope, and when I seen I was going to fall I put that arm around the stanchion and thought I could hold myself there, but the arm broke.

Q. Where was your body when the arm broke?

A. In between the stanchion, like this.

Q. You mean your body was hanging off the planks?

A. My body went between here, and the arm went around the stanchion.

Q. What do you mean by here, body went in below there?

A. Below there.

Q. Between the middle stanchion and the "Jacksonville"?

A. Between the middle stanchion and the gangway, went in between the two ships. I was hanging about between the two ships.

[fol. 37] Q. Assuming this upright was the stanchion, show the jury how you had your arm?

A. Around the stanchion like this, and my body fell in between.

Q. The back of your hand was against the plank?

A. Yes.

Q. Your hand like this, holding yourself here?

A. Yes.

Q. What part of the stanchion did your arm come against?

A. The middle of the lower part.

Q. Between the elbow and wrist?

A. Yes.

Q. The stanchion was in here somewhere?

A. Yes.

Q. And your hand was on the planking?

A. Yes.

Q. And your body was hanging over the side then off the planks?

A. Yes.

Q. What did you weigh at that time?

A. I weighed about 186.

Q. What do you weigh now?

A. 194. I was down to 154.

Q. Do you know how long you were hanging there before you fell?

A. Not very long.

Q. Did you make any outcry?

A. Yes.

Q. Did anybody come?

A. There were only two men on deck; the second mate was sitting on the other side. I did not see him when I came ashore; the seaman was forward I was talking to, the only person I seen on the "Jacksonville". The boatswain put his coat on to come ashore after me.

Q. Was he with you when you fell?

A. No, he was on the well deck, and the other seaman was forward at the break of the forecastlehead, the only two people I saw there when I fell.

[fol. 38] Mr. Axtell: Will counsel produce the plans of the "Jacksonville" we asked for?

Mr. Cunningham: In view of the fact you just issued the subpoena, the only plan I can produce is here.

Q. Assuming this is the plan of the ship (most any ship would do, I suppose). Look at this a minute, Mr. Johnson. Which is the starboard side of this ship? Take this deck that shows the hatches.

A. This is the stern and this is the bow.

Q. This is the bow toward you?

A. Yes, sir.

Q. Now tell us where was the boatswain's room?
A. On the port side forward right there.

Mr. Axtell: I guess it is marked boatswain's room.

Q. We will put an "A" there. Leaving that part of the ship, where did you go?
A. I came aboard like this, went up there.
Q. How did you come aboard the ship? Make a mark showing how you came aboard.
A. That is the bridge deck, came over here, walked along here up to here.
Q. Step down here a moment. (Witness did so.)
Q. Now just show us where the ladder was you came aboard.
A. The gangway was just about here.

Mr. Axtell: Make a mark there.

Q. Are you ordinarily left-handed or right-handed?
A. Right-handed.
[fol. 39] Q. Mark this G. That is where the gangway was here.
A. Yes, came over the deck of the "Jacksonville" about to here.
Q. Now take your pencil and show us where you proceeded after you got to the deck of the "Jacksonville" from "G", where did you go? Show us the route. You got on the "Jacksonville" here. Can you see all right?
A. Yes, I went across the deck here.
Q. Draw a line.
A. Down the ladder here, up here, stayed there five minutes.
Q. Stayed there. That point we will mark "B." Where did you go then?
A. It was too warm, there is an alleyway here, and they had a bench right here.
Q. A bench right here. We will make a little thing to look like a bench and mark that "C."
A. I was talking to him there for a while.
Mr. Cunningham: Talking to whom?
The Witness: The sailor on deck, the only man I see. He wanted me to go in the forecastle, the sailor's quarters

are here, and in the morning see the mate. I walked across the deck; after I crossed the deck I went back to the boatswain, said "I am going ashore," so I walked over to him, and I walked across here and along the deck.

Q. Make a mark. Came back to point "G," on this line?

A. Yes.

Q. It leads from point B to G on the starboard side of the boat, is that right?

A. Yes.

Q. Now, then, how was the ship "West Compo" lying?

A. The same ship, but the stern is not right.

[fol. 40] Q. You mean taking this other drawing of the lower deck of the "Jacksonville," if you put the stern at this end, that would be the way she would be?

A. Yes, sir.

Q. Draw a line to indicate, that was the stern, this was the bow, and this would be the "West Compo"?

A. Yes.

Q. What was the space or distance between these two vessels from one ship to the other?

A. Down below, 8 inches apart, down below, about 2 feet up where the gangway was, 2 to 3 feet.

Mr. Axtell: I offer this drawing with the marks put on it in evidence.

Mr. Cunningham: No objection.

(Marked Plaintiff's Exhibit 1 in evidence.)

Q. Have you always worn glasses?

A. No.

Q. When did you begin wearing glasses?

A. Since I was hurt.

Q. Have you made a complaint in this case as to the condition of your eyes?

A. No.

Q. Has it anything to do with this accident?

A. That is more than I can say. They got weak all the time after. I think it has something to do with the head.

Q. Did Dr. Power examine you once or twice?

A. Yes.

Q. How many times has he examined you?

A. Once, I think.

Q. Do you remember X-rays being made of you?
A. Yes, sir.
Q. Where?
A. In West Street.
Q. Did Dr. Power make X-rays of you?
A. Two, I think.
[fol. 41] Q. Did you have some made at the Central X-ray Laboratory, Times Square?
A. Yes, sir.
Q. That was some time ago, wasn't it?
A. Three years ago.
Q. These made by Dr. Power were made more recently?
A. Yes.

Mr. Axtell: Your witness. I should like to call the X-ray man and identify the X-rays and let him get back. May I withdraw the witness?
The Court: If there is no objection.
Mr. Cunningham: No objection.

(Witness withdrawn.)

Henry F. Bronstein, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Axtell:

Q. You are an X-ray technician?
A. Yes.
Q. How long are you at that work?
A. 15 years.
Q. You have had hospital experience?
A. At Roosevelt, Lutheran, Manhattan State, United States Army, France.
Q. How many years in Roosevelt?
A. Six years. Lutheran over two years——

Qualifications conceded.

Q. You made these X-rays, six or seven of them, of this man John Johnson, of various parts of his body, chest, [fol. 42] head, nose, elbow, arm, leg, knee?

A. Yes, sir.
Q. I show you a report——
A. I have a copy.
Q. Those plates were made what date?
A. October 10, 1923.
Q. Did you print them and develop them?
A. Yes, sir.
Q. You know they are the pictures of this man John Johnson who is sitting over here?
A. Yes, sir.
Mr. Axtell: I offer them in evidence.

Cross-examination.

By Mr. Cunningham:

Q. You have identifying marks on them which identify them definitely with Johnson?
A. Yes, sir.
Q. You have just examined those photographs for the purpose of seeing those identifying marks?
A. Yes.
Mr. Axtell: I offer them in evidence.

(Marked Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8 in evidence.)
(Witness excused.)

JOHN JOHNSON resumed the stand.

Cross-examination.

By Mr. Cunningham:

Q. Mr. Johnson, did you see the chief officer on board the ship that afternoon after you got on board the "Jacksonville"?
A. No, sir.
[fol. 43] Q. Did you talk to the chief officer of the ship ever at any time?
A. Yes, three weeks previous to that when the ship came in.

Q. Three weeks previous to this?

A. Yes, sir.

Q. What was that chief officer's name?

A. That I do not remember.

Q. Then you do not know the chief officer whom you say you talked to three weeks before? Was'nt the chief officer on the ship on the day you met with your accident?

A. No.

Q. You do not know the chief officer who was the chief officer of the ship on the day you got hurt was Wayman, who joined the ship three or four days prior to your accident?

A. No.

Q. You did not talk to the second officer that afternoon when you came aboard the ship with Carlson, did you?

A. No, Mr. Carlson spoke to him.

Q. As a matter of fact, the only person you did talk to on the "Jacksonville" that afternoon that had any job higher than that of able seaman was boatswain Carlson?

A. Yes, and one seaman.

Q. I say, anything higher than the boatswain. You say the boatswain came to Sam's Hotel in Jacksonville about 4 o'clock that afternoon and asked you to come on board the ship to look for a job?

A. Yes, sir.

Q. How far from Jacksonville is Sam's Hotel?

A. About 4 miles.

Q. How did you get to the wharf?

A. Trolley car.

Q. What time did you say you got there?

A. A little after 6. Two watchmen were just relieving one another.

Q. You say you got there a little after six?

A. Yes, sir.

[fol. 44] Q. You could not be mistaken about the time you got there?

A. The only time I could tell—I had a watch on me, but I seen two watchmen relieving one another, which is usually 6 o'clock.

Q. You guessed it was 6 o'clock?

A. Yes, I was there——

Q. Never mind making a speech each time, Mr. Johnson. Just answer my question. You estimate it was about 6 o'clock?

A. Yes, sir.

Q. Were the men still working on board the ship when you got aboard?

A. Nobody working there.

Q. You are quite sure of that?

A. Yes, sir.

Q. And you are also sure you came on board the ship with Carlson, the boatswain?

A. Yes, sir.

Q. There could not be any mistake about that?

A. No.

Q. You are positive about it?

A. Yes, sir.

Q. And Carlson came on board the ship "West Compo" ahead of you and went down this gangplank which you described on to the "Jacksonville," some 12 or 14 feet ahead of you?

A. Yes, sir, 12.

Q. Did the gangplank end which was on the "West Compo" rest on the deck of the "West Compo"?

A. On the rail, about 4 inches higher, the rail, which was about 4 inches higher.

Q. What kind of rail was it on the "West Compo"?

A. Steel rail.

Q. Was it one of those ordinary gas pipe rails about that size?

A. A pipe rail up about——

Q. Pipe rail?

A. Yes, sir.

Q. You say that the gangplank rested on the rail?

A. On the rail of the ship.

Q. The rail of the ship?

A. Yes, sir.

[fol. 45] Q. And it did not rest on the deck of the "West Compo"?

A. The deck is 4 inches below the rail.

Q. Was there an opening in this rail?

A. No, sir.

Q. So you had to climb over the pipe rail and then step down on this gangway?

A. Yes, sir.

Q. And this gangway was at an angle of about how many degrees?

A. One ship being 8 feet higher than the other and the gangway 12 feet long, how much angle would there be?

Q. I am asking you. You are not asking me.

A. I am trying to figure it by myself.

Q. Give us an idea with your hand.

A. A little bit more than the box shows there.

Q. A little bit steeper than that?

A. Yes, sir.

Q. How high was the rail you had to climb over so you could step down on the "West Compo" end of the gangplank?

A. About 3 feet, I judge.

Q. When you got to the "Jacksonville" end of it it was hung up in the air by a sort of sling?

A. Yes, sir.

Q. In this style here?

A. As near as I can remember, in that manner.

Q. That is as you can remember?

A. Yes, sir.

Q. Is your mind perfectly clear on everything that happened that afternoon?

A. Yes, sir.

Q. You have not forgotten anything at all?

A. No.

Q. The sudden shock, fall and striking your head, did not drive any of the facts out of your mind at all?

A. At times I feel pale.

Q. The shock and fall and the bump you hit your head and the injury to your scalp did not drive any of the facts about what happened that afternoon out of your mind?

A. It does at times.

[fol. 46] Q. You remember them all clearly today?

A. Yes, I do. I have no pain in my head at the present time.

Q. You remember everything that happened clearly today?

A. Yes.

Q. What held the other side of the gangplank?

A. Nothing.

Q. It was like that?

A. It was wiggling. There should be guys there set to hold them. They might have been there and they took them off.

Q. Was there anything on the right hand side of this gangplank as I face you, any rope which attached to anything over here on the ship?

A. No.

Mr. Axtell: Indicating to the right as you face the "Jacksonville," to the speaker's right.

Mr. Cunningham: My right.

Q. In other words, your testimony is, the only thing that held steady the "Jacksonville" end of the gangplank was a sling which was tied to a davit?

A. Not to a davit, to the smokestack guy. The davit was hanging loose. It might have been tied there before. It was turned around to the gangway and nothing on it whatsoever.

Q. So there was a stay from the smokestack?

A. Yes, sir.

Q. And this rope was tied on to that?

A. Yes, sir.

Q. And that loop came around the lower end of the gangplank?

A. Yes.

Q. And that is the way in which it held?

A. That is the way I seen it.

Q. That is the way it was then if you saw it that way, wasn't it?

A. Yes, sir.

[fol. 47] Q. Will you tell me just where the stanchion was that you say you got your arm around and broken?

A. Right there. It is marked with lead pencil.

Mr. Axtell: Indicating about the middle of the gangplank.

The Witness: A little toward the lower end.

Q. What was that stanchion made of?

A. Steel.

Q. Did one end of it fit down into the gangplank?

A. Yes, there was a big hole and it was wiggling, it was loose.

Q. There is not any doubt in your mind at all there was a stanchion there?

A. The stanchion was there all right.

Q. You could not be mistaken about that, could you?

A. No.

Q. You did not have any trouble going down the gangplank that afternoon after Carlson went ahead of you did you?

A. No.

Q. Your trouble came when you came up the gangplank some time later?

A. Yes, half an hour later.

Q. What had you and Carlson been doing at Sam's Hotel?

A. Carlson was not at Sam's Hotel any more than a quarter of an hour.

Q. And you came down together?

A. Yes, sir.

Q. And after you got on board the ship having come down that gangplank, you went from there immediately to the boatswain's room?

A. Yes, sir.

Q. Did the boatswain have a room-mate?

A. Yes, but he was not there at that time.

[fol. 48] Q. What do you mean, he was not there?

A. He was not in the room. I seen him nowheres.

Q. You seen him nowhere?

A. No.

Q. Didn't you see him on the deck as you came along after getting down from that deck to the well deck?

A. No. Nobody there. A sailor was there.

Q. Didn't, as a matter of fact, Carlson introduce you to the carpenter?

A. Yes, three weeks ahead of that, which he spoke about in Jacksonville.

Q. Didn't Carlson call Stewart's attention to you that afternoon on the well deck?

A. Three weeks ahead of that.

Q. Answer yes or no.

A. No.

Q. And you did not see Mr. Stewart on the well deck that afternoon?

A. No.

Q. Did you see Mr. Stewart all that afternoon?

A. No, sir.

Q. How long were you in the boatswain's room?

A. About five minutes.

Q. Didn't you say something earlier in your examination about being there 15 minutes?

A. Outside of the door, standing at the door.

Q. When you were in the boatswain's room was the door open or closed?

A. Open.

Q. All the time?

A. Yes, sir.

Q. Was the boatswain in there with you?

A. Yes, sir.

Q. You had known the boatswain quite some time?

A. Yes, sir.

Q. Carlson and you were quite old friends?

A. No, he boarded in Sam's Hotel two or three times while I was there.

Q. You had known him quite a while?

[fol. 49] A. Six months or so, maybe eight months, seen him two or three times before.

Q. How large is the boatswain's room?

A. That I could not say exactly. It is not a very big room, two beds in it.

Q. It is the room which the carpenter and the boatswain use?

A. Yes, sir.

Q. And it is a room about 8 feet by 5 or 6, isn't that right?

A. Yes, all of that if not more.

Q. Did the carpenter come there to the room while you and the boatswain were in there?

A. No.

Q. The door was not closed any time?

A. No.

Q. Did you have any drinks before you came on board?
A. I had a bottle of near beer the whole day.
Q. You had a bottle of near beer during the entire day?
A. Yes.
Q. Did you have anything to drink after you got aboard the ship?
A. No.
Q. Nothing at all?
A. No.
Q. Did not have anything to drink in the boatswain's room?
A. No. Three weeks before I had a drink——
Q. I am asking you today. Did you have anything to drink in the boatswain's room that afternoon?
A. No.
Q. Had the boatswain anything to drink?
A. No.
Q. Did the boatswain have anything in his room that afternoon?
A. I seen none.
Q. He did not give you any?
A. No.
Q. Did you ever tell anybody you got some in that room?
A. No, sir.
Q. You are sure of that?
A. Not at that time.
[fol. 50] Q. Did you some other time?
A. Yes, sir.
Q. When?
A. Three weeks ahead of it I had one drink.
Q. Listen, Mr. Johnson. I am talking about the time you got hurt, and from that day to this. Never mind about three weeks before that. Did you ever tell anyone that you had anything to drink in that room that afternoon?
A. No.
Q. You are sure of that?
A. Yes, sir.
Q. And you are sure you had not anything to drink beyond a bottle of near beer that day?
A. Yes, sir.
Q. What time did you say you got on board the ship?
A. Some minutes after six, four or five minutes.

Q. What time do you think it was you left the ship?

A. About a quarter to seven.

Q. So you were there, according to your statement, about perhaps three-quarters of an hour, or maybe 40 minutes?

A. A little over half an hour.

Q. If you left there a quarter to seven you got on board a quarter after six, didn't you?

A. Yes, sir.

Q. And when you found the mate was not there, or the chief officer, you stayed on board upwards of half an hour after that?

A. Yes, sir.

Q. Then you decided to leave?

A. Yes.

Q. Were you in the boatswain's room when you decided to leave the ship?

A. No.

Q. Do you leave where you were accompanied by the boatswain?

A. The boatswain stayed in the room, and I stood and spoke with the sailor sitting there alone. It was too warm in the room. There was a little air in the alleyway there, and I went and stood there.

[fol. 51] Q. And then you went on your way alone?

A. Yes, sir.

Q. Went along this amidship deck or well deck until you came to the ladder or stairway leading up to the boat deck?

A. Yes, sir.

Q. And crossed the ship to where the gangplank was?

A. I crossed the ship at the break of the forecastlehead.

Q. So you crossed the ship at the after well deck?

A. On the forward well deck.

Q. And went up the other side of the ship and got up to the boat deck by means of that ladder?

A. Yes, sir.

Q. Then you stepped up on the gangway, which you described as swinging, suspended in this manner?

A. Yes, sir.

Q. You had not seen any officer of the ship all that time?

A. Only when I came aboard.

Q. You had not seen any officer of the ship to speak to all that time?

A. No.

Q. You did not see any officer on board the ship?

A. No.

Q. And had not stated your business to anybody on the ship at all?

A. No.

Q. Why did you go on the ship?

A. To look for employment.

Q. You went on board looking for a job?

A. Yes, sir.

Q. And the boatswain was the man suggested to you to come on board and look for a job?

A. Come on board.

Q. You answer my questions, answer yes or no. The boatswain was the man who asked you to come aboard and look for a job?

A. Yes.

Q. And you say the boatswain wanted you to come on [fol. 52] and look for a job as carpenter?

A. Yes.

Q. Don't you know they had a carpenter on board then?

A. Yes, sir.

Q. Then you knew the job of carpenter was not vacant?

A. He had been ashore three days.

Q. The carpenter had been ashore three days?

A. Yes.

Q. What was the carpenter's name?

A. Stephen—Steve.

Q. Wasn't it Stewart?

A. Some name like that.

Q. You do not happen to see him in the room here anywhere?

A. No.

Q. Mr. Stewart, would you mind standing up? Does this man look like the man you say had been ashore three days?

A. No.

Q. Don't you know that was the carpenter of the "Jacksonville" at the time, Mr. Johnson?

A. No, I could not see him from here.

Q. Come up closer, Mr. Stewart, where you can be seen.

A. My eyes are bad, I could not see so far. I seen that man before, yes.

Q. He was the carpenter, wasn't he?

A. Yes, sir.

Q. The last time you saw him was in the office of the United States District Attorney in Jacksonville, when the deposition was taken of his testimony, August 4, 1926?

A. Yes, sir.

Q. You had a talk with him that afternoon after he got through giving his testimony, didn't you out in the hall?

A. Yes, he told me I should have seen him before.

Q. You did have a talk with him after he had given his testimony?

A. Yes, sir.

Q. Now, you saw that man around Jacksonville for three [fol. 53] days before Carlson came looking for you?

A. I did not see him. I heard them say so.

Q. You heard someone say so?

A. Yes.

Q. You did not know as a matter of fact he was on the ship every day?

A. I could not prove it, no, sir.

Q. Do you know who put the gangway there?

A. No, I was not there when it was put up.

Q. You do not know about that?

A. No.

Q. Did you get a job on board the "Jacksonville" that day?

A. No.

Q. You never had a job on the "Jacksonville"?

A. No.

Q. Never were hired?

A. No.

Q. Never were employed on it?

A. No.

Q. You went on of your own accord, your own business?

A. With the boatswain to hire.

Q. You went on looking for a job?

A. Yes, sir.

Q. You went on to get something for yourself, a job?

A. Yes, sir.

Q. You were out of a job at the time, weren't you?

A. Yes.

Q. How long had you been ashore after leaving the ship just previous to the accident?

A. Six or seven days, something like that.

Q. Do you know whether or not they were repairing the "Jacksonville" at the time that she was lying there outside the "West Compo"?

A. I heard she was in for repairs, machine job.

Q. Machinery repairs?

A. Yes, sir.

Q. Repairs being done to the engines, steering gear and deck winches?

A. I heard so.

Q. You do not know how many men were working on that job?

A. No.

[fol. 54] Q. You do not know how long the job of repairing had been going on?

A. Three or four days.

Q. Before you got hurt?

A. Yes, sir.

Q. Have you any idea how many men were connected with the crew?

A. No. Around 40, I should think.

Q. Did you ever hear of anybody else being hurt on this gangway except you?

A. No.

Q. You did not have any trouble at all coming down the gangway on to the ship, did you?

A. No.

Q. Did you have a hold on the hand rail or rope rail as you came down the gangway to the "Jacksonville"?

A. Yes.

Q. As you came down from the "West Compo," down the gangplank, was the rope rail or hand rail on your left or right?

A. On the left.

Q. So when you went up the gangway to leave the "Jacksonville" to get on to the "West Compo" it was on your right?

A. Yes, sir.

Q. And did you have hold of the rope rail in going up the gangway?

A. Yes, sir.

Q. How high was the "Jacksonville" end of the gangway above the deck of the "Jacksonville"?

A. One foot and a half, possibly two feet.

Q. About 2 feet?

A. Yes, sir.

Q. And you say you stepped upon a box first?

A. Yes, sir.

Q. And then you say you stepped up on to the gangplank?

A. Yes, sir.

Q. And you say the distance between the "Jacksonville" end of the gangplank and this box was about 4 inches or so?

A. Above the box.

Q. And you are sure it did not touch the box at all?

A. Not that I could see.

[fol. 55] Q. You could have seen if it did touch, couldn't you?

A. Yes, I could feel it too. By slacking the ropes it might have touched it, but that is really more than I can say.

Q. Do you know whether it touched the box after you started up the gangplank?

A. No.

Q. You don't know?

A. No.

Q. Didn't you say it did not?

A. I did not feel it.

Q. Let us get this clear. Heretofore I thought you said it did not touch the box, but swung clear in this sling.

A. The box was a little way from the gangplank so it could not touch it nohow.

Q. As a matter of fact, wasn't this box on which the Jacksonville end of the gangplank rested a box about 3 to 3½ feet high and described as a vegetable box?

A. No.

Q. Sure of that?

A. I am quite sure it was not any more than one foot and a half.

Q. When you came on board the ship that night it was daylight, wasn't it?

A. Yes, sir.

Q. As a matter of fact, you came on the ship considerably earlier than you said, didn't you?

A. No.

Q. Didn't you come on at 5 o'clock?

A. No, sir, after six.

Q. You say you left around a quarter to seven?

A. Yes.

Q. Broad daylight still?

A. No, it was sundown, and the lights should have been out, and there was no lights there.

Q. When you say out, you mean they should have been lighted?

A. Yes, sir.

Q. Do I understand a quarter to seven on August 1st [fol. 56] in Jacksonville it is dark?

A. Sundown.

Q. Do I understand you to testify that at a quarter to seven on August 1st in Jacksonville it was dark?

A. After sundown.

Q. Did you understand what I asked you?

A. Yes, sir.

Q. Did I understand you to say at that time, a quarter to seven, it was dark?

A. It was beginning to get dark.

Q. Could you see what you were doing clearly?

A. I was out on deck all the time, I could see a little. I could see fairly good.

Q. You could see a little?

A. Yes, sir.

Q. You could see enough to see the gangplank end on the Jacksonville end did not quite touch the box?

A. Yes, sir.

Q. As a matter of fact, it was still quite light?

A. It was about a quarter to seven.

Q. It was still quite light?

A. It was beginning to get dark.

Q. Were there any cluster lights rigged over the Jacksonville end of the gangplank?

A. No, sir.

Q. None whatever?

A. I seen none.

Q. Were there any there?

A. I could not say if they were there, I could not see any.

Q. Were there any lights rigged over the "West Compo" end of the "Jacksonville"?

A. No, not when I went over. It was quite daylight then, and I could see if they were.

Q. I asked you whether there were lights rigged over the "Jacksonville" end of the gangplank and you said no.

A. No.

Q. And you understood me?

A. Yes, sir.

Q. Were there lights rigged over the "West Compo" or [fol. 57] upper end of the gangplank?

A. I seen none.

Q. Will you say they were not there?

A. No, sir.

Q. Will you say they were not lighted?

A. I seen nothing there in the line of lights.

Q. Then do you testify or tell us they were not lighted at the time?

A. No.

Q. What?

A. They were not lighted.

Q. Now you definitely tell us the lights on the "West Compo" end of the gangplank were not lighted?

A. No.

Q. Was there a wedding party or dinner going on on the "West Compo" that night?

A. I heard of it afterwards. I seen none of them.

Q. Don't you know as a matter of fact because of that the decks of the "West Compo" were brilliantly lighted in honor of the wedding party going on?

A. It might have been after I left there, yes.

Q. But not before?

A. Not before.

Q. Did you ever see the testimony which Mr. Stewart gave down there in Jacksonville in reference to this claim of yours?

A. Yes, sir.

Q. When did you read it over last?

A. I don't remember now.

Q. Have you read it over within the last few days?

A. Some time ago, shortly after I came back from Jacksonville I read it over.

Q. Did you hear the testimony given that day when Mr. Stewart was examined by the United States Attorney down there?

A. Yes, sir.

Q. Were you present when Mr. Andrew was examined also?

A. Yes, sir.

Q. And when Mr. Floyd was examined?

A. Yes.

[fol. 58] Q. And have you read their testimony over since that time?

A. Yes, sir.

Q. Then you know, don't you, that they testified that the Jacksonville end of the gangplank rested upon a vegetable box about 3 feet high?

A. Yes.

Q. But your testimony is it swung in the air?

A. Yes.

Q. How was this hand line which extended along the right hand side of the gangplank as you went by it to the "West Compo"?

A. It was hanging all slack.

Q. How large was this hand line which served as a hand rail?

A. Half an inch.

Q. Half an inch thick?

A. Yes, sir.

Q. About the thickness of your forefinger or mine?

A. Yes, sir.

Q. Where was that fastened on the West Compo?

A. On the rail.

Q. Where was it fastened on the Jacksonville?

A. On to the smokestack guy, which the gangway was hanging on.

Q. It was not fastened to the boat davit?

A. No, the boat davit was 3 feet above that.

Q. You say it came down and went through a stanchion?

A. Yes, sir.

Q. Don't you know as a matter of fact it went directly from the rail of the West Cowpo to the boat davit of the *Jacksonville* without a stanchion?

A. No.

Q. There was not any other means of getting to the *Jacksonville* or ashore but by means of this gangplank?

A. No, sir.

Q. You say it was 12 feet long?

A. Yes.

Q. Composed of how many planks?

A. Two was all I saw. They said it was three.

[Ed. 39] Q. You only saw two?

A. Yes, sir.

Q. How was the gangplank the way you saw it?

A. It was open about an inch in the middle, about 20 inches.

Q. About that wide?

A. Yes.

Q. How was it held together?

A. Small cleats nailed across.

Q. Cleats nailed across which held the two planks steady?

A. Yes.

Q. On bottom or on top?

A. On top.

Q. How far apart were those cleats?

A. About one foot and a half apart.

Q. They served as something for you to get your footing as you went up or down, did they not?

A. Yes, sir.

Q. You would not say there were three planks nailed together there?

A. I only saw two.

Q. You would not say there were not three planks nailed together?

A. No.

Q. So if it should be testified to by those who made the gangplank that there were three, it would be quite likely their testimony would be more accurate than yours?

Mr. Axtell: I object, calling for a conclusion of mind.

The Court: I sustain it. It calls for a conclusion. You can ask if it would change his opinion.

Q. Would it change your opinion if it were testified here by the men who made the gangplank that it consisted of three 12-inch planks held together by cleats, as you described the cleats?

A. As I look at it, I only see two planks there.

[fol. 60] Q. When you came down the gangplank following Mr. Carlson you noticed then that the gangplank swayed?

A. It did not sway much when I came down.

Q. Did you notice then it was held on the Jacksonville end loosely, as you described?

A. No, I did not look at it at all.

Q. When did you notice that?

A. When I came up in the middle of it to go ashore.

Q. When you started to leave the ship you noticed the lower end of the plank was simply in a sort of sling?

A. Yes, I looked what I was holding on and hanging in and I seen the way it was.

Q. All you have told us about how the gangplank was fastened on the Jacksonville end was what you saw when you were holding on to this rope in the act of falling off the gangplank?

A. Yes.

Q. How long did that last, that falling off act of yours?

A. About a minute and a half or two minutes.

Q. Now, do you know how long a minute and a half or two minutes are?

A. It seemed quite long to me at that time.

Q. Will you tell me when I give you the word just when two minutes are up?

(Mr. Cunningham held a watch and the witness indicated when he thought two minutes had expired.)

Mr. Cunningham: That is 25 seconds.

Q. So when you say a minute and a half, it is pretty much of an estimate?

A. I could not hold my breath.

Mr. Axtell: It was 42 seconds.

[fol. 61] Q. So it was not a minute and a half or two minutes you were struggling there trying to prevent yourself from falling off, or anywhere like that, yes or no?

A. Yes, it was about two minutes.

Q. Was anybody near you when you fell?

A. No, sir.

Q. Did anybody see you fall?

A. Yes, one man at the break of the forecastlehead and the boatswain on the break of the bridge seen me as I fell when I was hanging there.

Q. When did you come to after being pulled out of the water?

A. Nine o'clock in the evening.

Q. By that time you had been taken off the ship, I presume, had you not?

A. Yes.

Q. And you waked up in the hospital?

A. Yes.

Q. Did I understand you to say that your scalp was hanging over your chin, over your face?

A. No, it was coming over here.

Q. The scalp was lying over a point on your forehead, folded over to a point above your eyes?

A. It is hard for me to tell. I was half unconscions; I could not say how far it was.

Q. You did say a minute ago when answering Mr. Axtell—what was it you told Mr. Axtell?

A. It was pulled over my face.

Q. Was it that way when you came to in the hospital?

A. It felt that way to me, half unconscious, I could not say for sure.

Q. What I am trying to get at is what was the fact; you told Mr. Axtell your scalp was pulled down half over your face?

A. Yes, sir.

Q. Did you mean it only felt that way?

[fol. 62] A. No, it was that way. I came to and they were pulling it back this way, to sew it up.

Q. Were you bleeding a good deal at the time?

A. That is more than I can say.

Q. You don't know?

A. No, sir.

Q. You were in St. Luke's Hospital one month and 17 days?

A. Yes.

Q. Then in Savannah?

A. Yes.

Q. For two years and a half?

A. Yes, sir.

Q. For two years and a half?

A. Yes, sir.

Q. Then from there to the Baltimore Hospital?

A. Yes, sir.

Q. And you were under treatment most of that time?

A. Yes, sir.

Q. You worked around the hospital somewhat as orderly, didn't you, part of the time?

A. No.

Q. Were you confined to your bed all that time?

A. No. I helped as interpreter quite a few times for the doctors.

Q. Did odd jobs around the hospital while there under treatment?

A. I was not able to do very much. I only had one hand to do anything with.

Q. And you say the doctors there in St. Luke's Hospital fixed your arm so the palm was out there?

A. No, they did not fix it. When it was hurt they left it that way.

Q. Put it in splints and left it in that position nearly six weeks?

A. Six weeks in St. Luke's and one month and 11 days in Savannah Hospital afterward.

Q. Now, you have been working as a watchman since 1923, haven't you?

A. Yes, sir.

Q. How much have you been earning a month?

A. $17 a week.

Q. An average of about $75 a month?

A. Yes, they first started in. Since I got a ship October I get a little more.

[fol. 63] Q. How much are you earning now?

A. $30 a week.

Q. That is about $140 a month for a month of four weeks and a half?

A. Yes, $130.

Q. So after you got out of the hospital you first went to work for about $17 a week, and four weeks in a month, that would be $68.

A. Yes.

Q. And for a month consisting of 31 days, you would get a half a week in addition?

A. Yes, sir.

Q. And that would make about $75 a month you earned as watchman from the time you started 1923?

A. Yes.

Q. And after awhile you got some raises in pay?

A. Yes, sir.

Q. How high did you get as watchman in the matter of pay?

A. $30 a week.

Q. Until you got the present job, and that is what you are getting now?

A. Yes, sir.

Q. And when you were a seaman on ships how much did you get?

A. $95, $125.

Q. But you were not getting that in 1920, were you—do not give us the war scale. Give us the scale you were getting when you got hurt?

A. Before I got hurt, a little before, I was watching on one of the Shipping Board ships, I had $6 a night.

Q. How much were you getting on the ship you were working on just before you met with your accident?

A. $95 a month.

Q. As what?

A. Boatswain.

Q. How many times had you been boatswain on any ship?

A. I have been on the Munson.

Q. How many jobs as boatswain had you held down?

A. Six or seven.

Q. Had you been boatswain previous to this job you [fol. 64] finished with before you were hurt?

A. Yes, sir.

Q. And you say you got $95 a month then?

A. Yes, sir.

Q. And you are getting $120 or $130 now?

A. Yes, I feed myself now.

Q. Of course, on the ship you got your food thrown in?

A. Yes.

Q. You do not know, of course, who hired the men on the Jacksonville, do you?

A. No.

Q. What time did you leave Sam's Hotel that day to go to the ship with Mr. Carlson?

A. Between 3 and 4.

Q. And you took the trolley down?

A. Yes, sir.

Q. Is the trolley near Sam's Hotel?

A. It goes right abreast of it.

Q. Did it take you two hours to go from there to the dock?

A. No, we walked down to Taylor's, not quite half ways, had a bottle of near beer, which we drank, it was very hot, we drank the bottle of near beer, and got the car down there.

Q. How far is Taylor's from Sam's?

A. Five or six blocks.

Q. So you walked five or six blocks around four o'clock in the afternoon?

A. We were standing outside the door a little while talking.

Q. Then you went in Taylor's?

A. Yes.

Q. And had this near beer?

A. Yes, sir.

Q. How long were you in Taylor's?

A. We were not there very long. I do not know how long.

Q. How long?

A. I could not say how long.

Q. Try to think.

A. I might have been a little over half an hour, three-quarters.

Q. You know you have to use up two hours from the [fol. 65] time you left Sam's Hotel until you got to the ship. How much time did you use at Taylor's?

A. Some time close to an hour.

Q. A little while ago it was one-half?

A. Three-quarters.

Q. What else did you have besides a glass of beer?

A. Nothing.

Q. Who was with you besides Carlson?

A. Nobody.

Q. Sure of that?

A. Yes; there were lots of people sitting at the tables, but I did not know them.

Q. Are you sure Carlson was with you at all that day at Sam's Hotel?

A. Not before I went down there.

Q. Are you sure he was at Sam's Hotel at all?

A. Yes, sir.

Q. Are you sure he started to the ship with you at all?

A. Yes, sir.

Q. Don't you know he was on the ship when you came on board?

A. No.

Q. Don't you remember as a matter of fact you sent word you arrived down on the dock and he sent for you to come on board?

A. No.

Q. You don't remember that?

A. No.

Q. Did you come in a taxicab from Sam's Hotel or not?

A. No.

Q. Who was with you in the taxicab if you came in one?

A. I seen no cab.

Q. Didn't you come in a taxicab?

A. No.

Q. What sort of cab was it you came in?

A. A trolley car.

Q. Who was with you?

A. Carlson, the boatswain.

Q. Sure.

A. Yes.

[fol. 66] Q. Had you been with Carlson the night before?
A. No.
Q. Sure?
A. He came to the house, he stood outside a while, but I was not with him.
Q. The night before?
A. The night before.
Q. Who was with him then?
A. Nobody.
Q. Who was with you?
A. Nobody.
Q. Where is Carlson now?
A. I don't know.
Q. You have not taken his testimony in this case?
A. No.
Q. Have you ever seen Carlson from that day to this?
A. No.
Q. Do you know what became of Carlson?
A. No.
Q. Do you know whether he remained to go on the voyage when the "Jacksonville" sailed?
A. No.
Q. Did you hear he did not?
A. No.
Q. Did you know he was discharged for being drunk three or four days later?
A. No.
Q. You did not know that?
A. No.
Q. And you never saw him since?
A. No.
Q. Do you know where he is now?
A. No.
Q. Have you tried to find him?
A. Yes.
Q. When did you last try to locate him?
A. Up to a couple of days ago.
Q. Been trying for practically five or six years to locate Carlson, haven't you?
A. Yes, sir.

Mr. Atwell: Will counsel produce the operating contract or payroll of the ship, or will you stipulate the Fleet Corporation was operating the ship at that time for the United States?

Mr. Cunningham: I think I have the payroll here. What do you want it for?

[fol. 67] Mr. Axtell: The stipulation the Fleet Corporation was operating the ship that time.

Mr. Cunningham: I won't stipulate the Fleet Corporation was operating the ship, because it was not. I have a payroll to show who it was that was operating the ship.

Mr. Axtell: Counsel has produced a photostat of the payroll of the "Jacksonville" covering July 30th to August 5th, 1920. I offer that in evidence.

(Marked Plaintiff's Exhibit 9 in Evidence.)

Mr. Axtell: Will counsel produce the operating contract between the American Shipping Company and the United States Shipping Board Emergency Fleet Corporation covering that date?

Mr. Cunningham: I haven't got it with me.

Mr. Axtell: We have subpœnaed the operating contract.

The Court: You have not made these people a party.

Mr. Axtell: I am trying to show the contract by which these people were operating for the Fleet Corporation. We subpœnaed it a long time ago.

Mr. Cunningham: The subpœna was served on our office today.

The Court: If you have not got it, do you want time to get it?

Mr. Cunningham: I do not know where it is.

[fol. 68] Mr. Axell: Can you stipulate it was an M. O. 4 contract?

Mr. Cunningham: I do not know, but I assume the American Shipping Corporation was operating the ship pursuant to one of the managing operating agreements which were incident to the way the Shipping Board maintained the operation of its ships.

Mr. Axtell: That may go on the record as a stipulation?

Mr. Cunningham: I can only let it go in in the exact words I gave you. I assume it.

The Court: You have not proved yet that the Emergency Fleet Corporation was operating the boat or owned it.

Mr. Axtell: We always have that produced.

The Court: It is denied in the answer.

Mr. Axtell: I know that.

The Court: Why didn't you subpœna it?

Mr. Axtell: We have subpœnaed it. It was subpœnaed a year ago when this case was on trial.

The Court: A year ago was too long ago.

Mr. Axtell: And yesterday.

The Court: And that was too short.

Mr. Axtell: Ordinarily they attach it.

Mr. Cunningham: Mr. Axtell knows when he sues the operator and the Fleet Corporation and joins the two as defendants the operating agreement is attached to the answer in which it admits it manages and operates pursu-[fol. 69] ant to that agreement, and he knows the Fleet Corporation does not operate it, and that is why the answer here is a denial.

Mr. Axtell: We entered into a stipulation with Major Dreyer——

The Court: Do not talk about that in front of the jury. (To the jury.) You can have a recess of 5 minutes. Do not allow anybody to talk to you about this case. (Jury left the court room.)

(The jury returned.)

William T. Power, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Axtell:

Q. Are you a practicing physician, doctor?
A. I am, yes, sir.
Q. Licensed in this State?
A. Yes, sir.

Q. Will you state briefly your experience and qualifications?

A. I graduated from medicine——

Mr. Cunningham: I concede Dr. Power's qualifications, and that he is a competent doctor.

Mr. Axtell: Will you concede he is an unusually competent doctor?

Mr. Cunningham: He is a practicing physician of the State of New York with plenty of experience and has testified for you many times in your cases.

Mr. Axtell: I have not asked for gratuitous suggestions of that character.

[fol. 70] Q. Do you do X-ray work, doctor?

A. Yes, sir.

Q. It is a fact you examine a great many seamen for me whose claims I represent?

A. I do, yes, sir.

Q. Did you examine Mr. Johnson?

A. Yes, sir.

Q. The plaintiff in this case who sits back there?

A. Yes, sir.

Q. When did you last examine him?

A. March 4, 1927.

Q. Did you make an X-ray of him yourself?

A. I made an X-ray of his left forearm, and also examined that arm under the fluorscope.

Q. Is this the X-ray you made?

A. Yes, sir.

Q. Will you look at it and make sure that is the one?

A. Yes, that is my X-ray; my name is on it.

Mr. Axtell: I offer that in evidence.

(Marked Plaintiff's Exhibit 10 in Evidence.)

Q. Did you develop and print it yourself?

A. Yes, sir.

Q. Now, Dr. Power, will you just tell what the X-ray we just had here shows?

A. This is an X-ray of the left forearm. This bone on the outer side is known as the radius and the one on this side is known as the ulna. In this picture this is the radius on this side and the other one is the ulna.

Q. Are those two taken from different views?

A. Yes, different positions. The one is from front to back and the one on the right hand side is sideways.

[fol. 71] Q. And that shows the condition as it was the other day?

A. The 4th of March. The radius shows here, an old healed fracture in the upper third. The fragments are united with a little angular effect bending it toward the other bone, the ulna. The ulna has, down at the juncture of the lower and middle third, an old healed fracture, healed in perfect position. At this point, at the juncture of the upper and middle third is another fracture which is not firmly united. It shows better on this picture. You can see the angulation here. I examined this also under the fluoroscope, which is an instrument by which you actually see the bones to check up, and found there is false motion in the bone here, the union between the two is not bony, it is union of a cartilaginous nature.

Q. Take this picture of the same bone, but made in 1923, being Exhibit 7. This is the one produced by the Central X-ray man a little while ago, who says it was made in 1923, I believe, October 10th, does that show the same bones with the picture taken in about the same relative positions as you have shown it on your plate?

A. It does.

Q. What is the difference?

A. In the lateral view here it shows distinctly lack of union. In the upper fracture of the ulna——

Q. Is that this place?

A. Yes.

Q. The dark line between the ends of the bone shows while they are united it is not a bony union?

A. Yes.

Q. There is a cartilage there and the cartilage does not show on the plate?

A. Yes.

Q. But you can tell from manipulating the arm that the bones were readily united?

A. Yes.

[fol. 72] Q. Is this the elbow here?

A. That is the elbow joint.

Q. Did you hear the explanation of the plaintiff as to the manner in which he had broken his arm?

A. No.

Q. Assuming he said he was on this gangway going up, that there was a stanchion near the middle on the right hand side, and that he fell between that stanchion and the end of the gangplank nearest the ship which he was leaving, and that his arm went around the stanchion and he weighed 180 pounds or so, and his body was hanging off the plank, his arm went around the stanchion in the position I am demonstrating now, that his hand was against the plank itself, that while he was hanging there he heard the bones crack, can you state with reasonable certainty from the condition of these bones as indicated in the two X-ray plates, whether or not the bones were broken in that fashion? Assume further in falling he fell between the two ships, scraping his jaw and scalp, cutting his scalp open, was knocked unconscious, and received some other injury to his leg.

A. Yes, I could.

Q. Do you have in mind X-rays made of his wrist which failed to show any fracture of the bones of the wrist when you made that answer?

A. I have seen all these X-rays when he came to my office for examination. I have in mind the whole condition.

Q. Look at X-ray Exhibit 4 and state if that is an X-ray of the left hand, of which the X-ray of the arm has been shown?

A. This is the left hand and wrist.

Q. Do you find evidence of fracture of the bones in the wrist?

A. There is no fracture of bones there. There is atrophy.

[fol. 73] Q. Bearing in mind there is no fracture of bones in the wrist, and the bones above are broken, and he testifies he hung in that position I described from the gangplank with his arm around the stanchion, could you, with all those facts, state with reasonable certainty the fracture of the bones of the forearm did occur in the manner he described?

Mr. Cunningham: I object, calling for a conclusion on the part of the doctor.

The Court: Sustained. All he can testify to is whether he can testify with reasonable certainty whether that was a competent and producing cause.

Q. Can you state whether, with reasonable certainty, that kind of strain could be the competent and producing cause of such a fracture?

A. Yes.

Q. Had he fallen clear from the gangplank in between the ships and struck the fender or whatever was lying there, and had thus broken his arm, do you think it possible or probable some bones in the wrist would also be broken?

Mr. Cunningham: I object, calling for a conclusion.

The Court: Sustained.

Q. What do you find else in this X-ray of the wrist?

A. The lower ends of the radius and ulna, bones of the wrist, and the upper ends of the bones of the hand, are all atrophied.

Q. Atrophy means what?

A. Wasted.

Q. What is the cause of the wasting, in your opinion?

A. Lack of use mostly.

[fol. 74] Q. Taking Exhibit 5, can you tell what that shows, if anything?

A. That is an X-ray of the head and face. That shows rather indistinctly a fracture of the nasal bone at this point.

Q. I show you a picture marked Plaintiff's Exhibit 6. Can you explain that to the jury?

A. This is an X-ray of the knee joint and the femur or thigh bone above it and part of the bones of the leg below. This shows an old united fracture of the junction of the lower with the middle third of the femur.

Mr. Axtell: It is admitted on the record the man had this fracture of the femur bone above the knee before. No blame is attached to the ship for that.

A. The patella, or knee-cap here shows a diamond area, a small new growth of bone on the edge here, and on the upper border here.

Q. Assuming that the plaintiff said that his knee was injured and swollen and inflamed and that the doctor was boring into it, or something, a short time after he entered the hospital; that he now complains while the knee was all right prior to the accident, it bends back further than it should a couple of inches and further to the side; can you

state whether or not such condition might have been produced by such injury as falling in between ships?

A. Such a fall might injure his knee.

Q. What is the matter with that knee, what does it mean to you as an expert?

A. This protrusion of bone there might be the result of injury to the bone, or might be the result of periostitis, which is an inflammation of the covering of the bone.

[fol. 71] Q. Can you tell the jury what the doctor was probably doing when he was looking into his knee, as he called it?

Mr. Cunningham: I object, calling for a conclusion.

The Court: Objection sustained.

Q. Did you examine his knee the other day?

A. I did.

Q. What did you find to be the condition?

A. I found that it was capable of over-extension, that is to say, of bending more than normal and showed a weakness of the ligaments controlling the joints.

Q. What is the ordinary, competent producing cause of such condition?

A. Usually any injury about the knee, severe strain, also a synovitis, inflammation of the lining membrane of the joint.

Q. Does this X-ray, Exhibit 5, show anything in connection with his injury or accident?

A. This does not.

Q. Will you tell the jury what you observed as to the physical condition of the arm at the time you examined him?

A. I found he had a long scar resulting from a wound. He told me he had an operation of the arm, and this appeared to be the scar of operation, one extending the whole length of the left forearm. I found that the left forearm was smaller than the right, that the whole arm appeared shorter than the right. There was a scar like swelling about as big as a large—as big as about half of a small tangerine—smaller than that—probably the size of a hickory nut at this scar about the middle of the arm. On manipulation of the arm there was false motion at the point of the upper [fol. 72] fragment of the ulna where there should be no motion. His grip was weak.

Q. Do you recall whether he could close his hand?
A. He could close it, but weakly.
Q. Would you mind looking at his hand now and ascertaining to what extent he can close his hand?
A. He has a weak grip in the hand.
Q. Can he close his hand close up if he has nothing in it?
A. It does not close all the way; closes half way.
Q. By using force you can bend the fingers back and he seems to have evinced some pain?
A. Yes, sir.
Q. Did you examine his head?
A. Yes.
Q. What did you find there?
A. I found a linear scar running in a line across the lower part of the skull at the back.
Q. What is the extent of it?
A. About 4½ or 5 inches—4½ inches long.
Q. Did you find any other scar?
A. On his head?
Q. Yes.
A. No, I did not.
Q. Did he tell you anything about his scalp having been torn off?
A. Yes, sir.
Q. Did you examine him to see if it was possible his scalp was torn at the sides to permit such a thing to occur?
A. It did not appear to me it came over as he described it. Patients frequently think that.
Q. You are inclined to think he was mistaken about that?
A. Yes; I doubt if it came as far forward as he thinks.
Q. Are you accustomed to estimating the extent of loss of function of any particular member, arm or leg?
A. Yes, sir.
[Vol. 777] Q. Have you made such experts for the Compensation Commission?
A. Yes, sir.
Q. Would you please state in your opinion what is the amount of loss of function in the left arm?
A. In my opinion he has lost 75 per cent. of the function of the entire left arm.
Q. Is that condition permanent?
A. Yes.

Q. And as to the left leg, how about that?

A. His left knee, that hyperextension of the knee causes it to be weak.

Q. From the point of view of a seaman how much function has he lost, if any?

A. In my opinion about 15 per cent.

Q. Did you observe whether there were any scars on his jaw or chin?

A. I do not remember seeing any.

Q. Will you step up here again, Mr. Johnson?

(The plaintiff did so.)

Q. Look at his chin and see if you can see any now?

A. Yes, there is a scar just to the left of the median line on the under side of the lower jaw, about approximately one inch long.

Q. Will you show me where the scar is on his head?

A. It is right in this crease.

Q. You do not find cuts up here that would indicate it might have been torn up there?

A. No.

Q. Is there any question in your mind but what that is a scar, doctor?

A. None whatever.

Q. If this man is 55 now, and prior to August 20th was in good health, and free from accident or injury, except an accident of a fracture of the femur bone 5 or 6 inches which had healed, and a fracture of the bridge of the nose, [fol. 78] and that he fell from a gangway of a ship a distance of 12 or 15 feet between two vessels which were about 2½ or 3 feet at the top part and the bottom possibly 8 inches; that he broke his left arm, he heard it crack while he was hanging to the gangway while the arm was passed around a stanchion, and he fell down striking the back of his head on the steel rail of a ship, scraping his head on the rivets——

Mr. Cunningham: That is the first time I heard testimony he struck his head on a steel rail of a ship.

The Court: I did not hear it.

Mr. Axtell: I recall the plaintiff said that.

The Court: I do not recall it: it may be so.

Mr. Axtell: I will risk it that he did say so——

Mr. Cunningham: All right, let it go.

Mr. Axtell: And consent it be stricken out if the reading of the minutes discloses I am in error.

Q. (Continuing:) Assuming that was testified to, that afterwards he came to in the hospital about 9 o'clock and stayed in this hospital for one month and some days, that his arm was in a splint and his hand turned out, and he was afterwards transferred to another hospital, remained there a month or so, and then another operation was performed, perhaps two operations performed, that his scalp had been stitched up before, and his chin had been stitched up, could you state with reasonable certainty whether or [fol. 79] not such a fall might have been the competent producing cause of the injuries from which you found him to be suffering at the time you examined him?

A. Yes.

Q. Was such fall, in your opinion, the competent producing cause of such injury?

A. In my opinion, yes.

Q. Did you examine this man's eyes, or did he make complaint about his eyes?

A. I examined his eyes.

Q. Are you a specialist as well in eye diseases and treatment?

A. I am.

Q. Will you state your experience in that direction?

A. After serving an interneship in the General Hospital, leaving there in 1904, I entered the New York Eye & Ear Infirmary to take up eye work.

Mr. Axtell: Perhaps you will concede that.

Mr. Cunningham: That is the first time I heard it.

A. I have been practicing as an eye specialist for 20 years.

Q. Prescribe glasses?

A. Yes, sir.

Q. Did you test his eyes?

A. Yes, sir.

Q. In what condition did you find them?

A. I found he had a vision known as 20/120. That would be about one-fifth of normal vision, but corrected

by glasses to normal vision. He has one degree of far-sightedness.

Q. From your examination of this man do you think any injury he might have sustained that night, due to being struck on the head, has anything to do with his vision?

A. No.

Q. In your opinion that has nothing to do with his eyesight?

A. No, he has had that far-sightedness all his life, probably.

[fol. 80] Cross-examination.

By Mr. Cunningham:

Q. You had to look quite closely before you discovered the scar on the chin?

A. Yes, sir.

Q. And you had to look with almost equal closeness to find the scar in the back of the neck?

A. At first.

Q. It might be the normal crease of a normal fat man or a man beginning to show the sign of age?

A. At first glance, but on examination it showed to be scar.

Q. You have not any doubt it has the signs of scar?

A. It is the site of scar.

Q. A scar he got from a cut at the time of the accident, you haven't any doubt about that?

A. No.

Q. But you have serious doubt about the accuracy of his statement that his scalp was hanging over his eyes when he came to in the hospital at 9 o'clock?

A. Yes.

Q. As a matter of fact, it would be an almost foregone conclusion before he came to the nurse or doctor would have pulled his scalp back in place?

A. Yes, sir.

Q. How do you account for his telling that story?

A. It is an ordinary story from a patient with a bad scalp wound.

Q. It is an hallucination?

A. It is their conception of what happened.

Q. So if he had a conception of that sort with respect to his injuries which was the result of the shock, there might also be a considerable doubt as to the accuracy as to what happened in sustaining the fall, might there not?

Mr. Axtell: I object.

[fol. 81] The Court: You put him on as an opinion witness.

Mr. Axtell: Not as to comparisons.

The Court: I will let him answer.

Mr. Axtell: I object to that, taking a question from the jury. It is for the jury to draw the conclusion.

The Court: I will let him answer.

A. In general all persons who meet with an accident find difficulty in giving an exact description of how they got hurt.

Mr. Axtell: I move to strike it out as not responsive.

The Court: Let it stand.

Mr. Axtell: Exception.

Q. Of course, if a man fell, weighing as much as this man testified he did, as I recall his weight at that time was 280 pounds, and not 180, as Mr. Axtell said, a fall of 15 or 20 feet between two ships could readily produce a badly fractured arm?

A. Yes.

Q. And if, as he said, the ships at the water level or edge were only 8 inches apart, there would be considerable difficulty about a man of that build hitting the water at all?

A. Yes.

Mr. Axtell: Who said 280 pounds?

Mr. Cunningham: He did.

By the Court:

Q. That is as true if he weighed 180 as if he weighed 280 pounds?

A. Yes.

[fol. 82] By Mr. Cunningham:

Q. If the ships were as close as Johnson said, 8 inches, it would be impossible for him to fall through so narrow a space?

A. Yes, sir.

Q. If the space was not wide enough for him to fall through, so he struck the side of the vessel, such striking of the vessel by a man of his size, 180 pounds, could produce the fracture you found in the picture?

A. A fracture of that kind could be produced by a twisting effect, a fall on his hand would give him *at* a Colles' fracture at the end of the bone.

Q. Do you mean the kind of fractures those photographs show could only be produced by twisting around something and wrenching his arm?

A. More apt to be produced by a twist than an ordinary fall.

Q. It would be possible for him to sustain such a fracture by his arm getting twisted around in the line itself, would it not?

A. Yes.

Q. He would not have to have a stanchion there, or anything of that sort?

A. Not necessarily.

Q. If his arm got twisted in it there, his weight in it, it might crack the bones?

A. Yes.

Q. And that could happen if a man lost his balance going up an incline 20 degrees and falling and trying to save himself?

A. If the arm was twisted in the fall.

Q. In the way in which he says?

A. Yes.

(At this point an adjournment was taken till Monday, March 28, 1927, at 10:30 A. M.)

[fol. 83] Brooklyn, March 28, 1927.

(Met pursuant to adjournment; present as before.)

Mr. Axtell: I offer in evidence the operating contract which we were discussing the other day.

(It is marked Plaintiff's Exhibit 11.)

Mr. Axtell: I want to recall the plaintiff for a moment.

JOHN JOHNSON, recalled, testified:

By Mr. Axtell:

Q. How long have you known me?
A. 12 or 15 years.
Q. Did you work for me at one time?
A. Yes.
Q. On a boat?
A. Yes.
Q. Did you work for Mr. R. L. Bigelow, a banker?
A. Yes.
Q. You had charge of his yawl "Flamingo"?
A. I did.
Q. Are you familiar with the custom or practice upon which seamen are admitted to the United States Marine Hospital?

Mr. Cunningham: I am willing to take Judge Campbell's ruling that he had a right to go to the hospital. If I am in error, I will admit it and will ask the jury to disregard what I said on that subject.

Q. When you went on board this ship the "Jacksonville" did you notice any sign or notice posted at the gangway [fol. 84] or at the dock or anywhere forbidding visitors or anybody to go on board the ship?
A. No, sir, there was no sign. There were two watchmen at the gate, which permitted me to go on board.
Q. But you saw no notice or sign of any kind at the gangway or at the dock with regard to people going on board this ship?
A. No, sir.

Crossexamination.

By Mr. Cunningham:

Q. One or two questions: All the treatment you had in the hospital, on the "Jacksonville," and all the treatment you had the two years and a half in the hospital in Savannah and the treatment you had afterwards in Baltimore in the Marine Hospital was entirely without any expense to you whatever?
A. There was no expense.

Q. It was free; it cost you nothing?

A. Yes.

Q. So that when you say in your complaint that you had paid out and would have to pay out large sums of money for medical and surgical attendance and for medicines and for your maintenance and cure, that is not so, is it?

A. I can't tell you about the complaint.

Q. Did you see the complaint before it was verified by Mr. Axtell, your attorney?

A. I saw some of the papers; I do not remember that.

Q. So, as it stands, you had all of that medical attention and treatment for upwards of 3 years free of charge, and have not paid out any money yourself?

A. The Sea Service calls for it.

Q. You heard what I asked you. I said you had it free.

A. I had it free of charge.

Q. It didn't cost you a cent?

A. No.

Q. You spoke of Sam's Hotel the other day and going [fol. 85] from there with Mr. Carlson down six blocks to Taylor's?

A. Yes.

Q. Was Taylor's on the trolley line also?

A. Right on the corner.

Q. Did the trolley line that went by Sam's Hotel go by Taylor's also?

A. It turned up at the corner.

Q. The trolley line went by Taylor's also?

A. Yes.

Q. Was Taylor's nearer to the dock than some of the other distances were?

A. It was nearer to the dock.

Q. Would you say 6 blocks nearer, when you were on the trolley?

A. 6 blocks nearer to the Jacksonville.

Q, What sort of a place was Taylor's?

A. It was soft drinks.

Q. Was it a saloon?

A. No, it was a place where you go in and call for sandwiches and get some refreshments.

Q. Did they have a bar there?

A. Yes, a counter.

Q. It used to be a regular saloon before Prohibition fell on us?

A. I never saw it before, so I do not know.

Q. Was that the first time you had been there?

A. I had been in there three or four times.

Q. (Repeated.) Was that the first time you had been there?

A. Before that?

Q. Yes.

A. Yes.

Q. How much of your time have you lived in Jacksonville?

A. Ever since 1901, every winter.

Q. So you have been living in Jacksonville for upwards of 18 or 19 years?

A. Something like that, yes.

Q. And you were pretty well familiar with the whole lay-[fol. 86] out of the streets in Jacksonville?

A. No, I am not very much acquainted.

Q. You were there for 19 winters?

A. I was there off and on. I was in ships; I stayed up there most of the time.

Lewis Snyder, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Axtell:

Q. What is your occupation?

A. Second officer.

Q. How long have you been going to sea?

A. 27 years.

Q. Have you ever been boatswain on ships?

A. Oh, yes.

Q. American ships?

A. American ships.

Q. Where were you born?

A. In New York.

Q. How old are you now?

A. 46 years.

Q. And during that time you have been boatswain?
A. Yes.
Q. How many times did you ship as boatswain?
A. Once in this country.
Q. How much of the time have you been second mate?
A. About 4 years.
Q. In what other capacities have you worked on ships?
A. Third and fourth officer, quartermaster, able seaman and deckhand.
Q. How long were you third and fourth officer?
A. Seven years.
Q. On what ships have you sailed?
A. I have sailed on a dozen different ships; I was on the "Alioth"——
Q. Without referring to the names, give us the trades [fol. 87] you were in.
A. Atlantic coast, South America, China, West Coast.
Q. What types of vessels have you shipped in?
A. Anywhere from 5,000 to 20,000 tons.

(It is stated that her gross tons are 3,853.)

Q. Have you shipped on any vessels of larger size?
A. Oh, yes, yes.
Q. Have you been on vessels that have been engaged in coastwise or trans-Atlantic trade?
A. Yes.
Q. Have you observed the rules under which these vessels are operated?
A. I am fairly familiar with the rules.
Q. Are you familiar with the methods that have been in vogue for getting employes for the deck department?
A. I am.
Q. Your services have been entirely limited to the deck department?
A. Well, yes; I might say so.
Q. You must have been in the engine room some time too. What were the average crew of an ordinary freight steamer in the coastwise or trans-Atlantic trade? What do they run.
A. It all depends on the size of the vessel; 7,000 tons would have 34 or 35 men.
Q. 30 to 40 men would run from 3,000 to 5,000-ton vessels?

A. Yes.

Q. Have you been in vessels carrying crews of that size?

A. Yes, sir.

Q. Are you familiar with the rules and regulations on those ships with regard to getting employes?

A. Yes.

Q. Had there been any custom or practice in vogue in 1920 of telling the boatswain to get men to work in the deck department under him?

[fol. 88] Objected to unless it develops that this witness has sailed in United States Shipping Board vessels.

A. I have sailed in Shipping Board vessels.

Q. You have?

A. Yes.

Q. Then answer the question, will you?

A. Yes, it was customary.

Q. What was customary?

By the Court:

Q. What is the custom? You say that there is a custom?

A. Yes.

By Mr. Axtell:

Q. What is the custom?

Mr. Cunningham: Objected to unless it appears definitely that ships this man has sailed on belonged to the United States Shipping Board and what the time was and when this particular experience was obtained.

The Court: He may answer.

Q. What was the custom at that time?

A. It is usually the custom that he may——

The Court: Custom means something that is generally done; not some isolated occurrence; not what is done on one ship, but what is generally done.

Mr. Cunningham: I think the witness should advise us first what Shipping Board vessels he has shipped on, and [fol. 89] how many of them.

The Court: If you want to cross examine him as to navigation, you may.

By Mr. Cunningham:

Q. What Shipping Board vessels have you sailed on?

A. I will enumerate them for you; the "Alioth," that was the first one in 1918, and the "Elvada."

Q. What year was that?

A. In 1919, the early part of 1919; there was the "Collingsworth."

Q. In what year?

A. In 1920. (Examines paper.) It will take some time to tell you. From July 21, 1920, to October 18, 1920, the "Collingsworth," and then on the "Phenix."

Q. When was that?

A. That was about in 1920; somewhere around there.

Q. Are those the only four United States Shipping Board vessels that you have sailed on?

A. No, I have been on more.

Q. Well, tell us about them.

A. Give me time to think about that.

(It is conceded that the Shipping Board has 1,500 boats.)

A. (Continuing:) The "West Sequana."

Q. When did you sail on that one?

A. In 1923. The "Dewey" in 1923.

Q. Any others?

A. The last one I was on was the "Westward Ho"—I guess that is about enough—from November to February, 1926-1927.

Q. So you have sailed in some seven Shipping Board vessels ranging from 1918 to February of this year?

A. Yes.

[fol. 90] Q. In what capacity have you sailed on those vessels?

A. Third and second mate.

Q. Anything lower or higher?

A. Well, as boatswain on the "West Sequana;" I came back from China in her about two years ago.

Q. So that was eight?

A. There may be more; I can't remember.

Q. In none of them did you ever serve as master or chief officer?

A. No.

Q. In your capacity you never had anything to do with hiring the men yourself, did you?

A. Well, when the chief officer wasn't there or the captain wasn't here I was in charge of the ship as second officer.

Q. Were there any occasions when you did the hiring yourself?

A. Not officially.

Q. What do you mean by "officially"?

A. When the captain and mate were out on the ship there was never any occasion for me to employ any men.

Q. And you never did employ any?

A. As second officer, officially, no; but——

Mr. Astell: Objected to.

The Court: He may answer.

Q. Those matters fall to the lot of the captain and chief officer?

A. In hiring the crew it falls to the lot of the chief officer.

Q. And the chief officer submits the men subject to the approval of the captain, does he not?

A. No.

Q. Then the chief officer has the say entirely, himself?

A. Well, I will answer that with reservations. That may be a matter that I have not mentioned. The master is always master of the ship, and if the master objects to any man he has got to go ashore.

[fol. 91] Q. So that after all, the action of the chief officer is subject to the approval of the captain?

A. Subject to the approval of the master.

Q. You have heard that there is a Shipping Board Sea Service Bureau, haven't you?

A. Yes.

Q. And you know that nobody is ever hired or permitted to go to work on Shipping Board vessels without having passed the Sea Service Bureau's approval first, or to men under the grade of officer?

Mr. Astell: Objected to, that counsel is going beyond the question.

The Court: He is trying to find out whether the witness is qualified. That comes up on cross examination.

By Mr. [illegible]:

Q. Will you answer the question now, what is the custom of American officers engaged on Shipping Board boats with regard to hiring men in the deck department?

A. Well, there are several ways of answering that question.

Q. Have my question. Is there any general custom or practice in such vessels that would delegate authority to the boatswain

Objected to.

The Court: You are leading the witness.

Mr. Cunningham: I think the question should be limited to Shipping Board vessels.

The Court: Yes, if it is a general custom. We are not examining the men up now. The general custom must be an industry custom.

[fol 91] Q. Tell what the custom is in regard to hiring a boatswain engage or get men for the deck department.

A. It all depends on how many men are required. If it is only one man a boatswain would go to the mate and say, "I am short a man," and the mate would say, "There is a good man ashore, go and get him." If it is a case the Shipping Board requires an officer's specific approval, and that has have to report for a good many years, and it is the custom today.

Q. Was there any general custom or practice in 1920 on American merchant vessels, including the Shipping Board vessels, with regard to permitting the crew of a vessel to have visitors on board?

A. Yes, under otherwise specifically ordered.

Mr. Cunningham: What does it mean?

A. (continued) When a ship gets alongside a dock special orders are issued that no outsiders are allowed on board.

By Mr. [illegible]:

Q. What is the customary method of issuing such rule?

Mr. Cunningham: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. The word is usually issued from the chief officer and comes from the captain in the form of writing or comes verbally sometimes. He will pass the word along at the dining table, "No visitors on board."

[144-50] Q. That would not go to the crew unless the men are in the dining room?

A. The chief tells the sailors; the chief officer tells his assistants and they tell the others and gangwaymen.

Q. Suppose they don't want anybody on board; what do they do then?

A. There is a sign placed in several different places that are public and open to the crew, probably one in the alleyway and one back aft.

Q. There is sometimes one at the foot of the gangway?

A. Well, it depends on the size of the vessel.

Q. Is it true that in American ships the practice has been to permit the crew to go ashore and to have visitors unless written notice are published to the contrary?

Objected to.

The Court: He has said that the orders were sometimes written and sometimes verbal.

Question withdrawn.

Q. Is it generally the custom on American vessels to permit visitors, and to permit men to leave the ship when not on duty?

A. Yes.

Q. Unless orders were issued to the contrary?

A. Yes.

Q. I suppose it sometimes happens in vessels that you have to cross the deck of one vessel to get to the deck of another one. Is that true?

A. Yes.

Q. That is a common thing in shipping, isn't it?

A. Yes.

Q. What is the usual method of providing men with means of getting from one ship to the other?

A. A gangway.

[144-51] Q. What is a gangway?

A. Well, a gangway is built of solid planks anywhere from an inch and a half to two and a half inches thick and battens nailed across the lanyards on each corner and each corner is made fast. The end on the upper ship is made fast up there and the end on the lower ship is made fast on the lower end.

Q. Are there any railings?

A. There should be life lines, one each side.

Q. Suppose one vessel's deck is 9 to 10 feet higher than the deck of the other ship or say the main deck of one boat is 9 or 10 feet higher than the boat deck of the other one and it is necessary to span that distance; that they are 2 or 3 feet apart; how long a gangplank would be necessary under such circumstances, in your judgment?

A. Well, it would be from 12 to 19 feet; anywhere from 12 feet up.

Q. If it was 10 feet distant and the gangway were only 12 feet long, you would only have 2 feet extra?

A. Yes.

Q. The gangway would be pretty near perpendicular?

Objected to as leading.

The Court: Yes, let him answer. Don't lead him.

A. Yes.

Q. Is a ladder used sometimes where you have not a gangway long enough?

A. Yes.

Q. What is the maximum angle that the gangway is usually erected at?

A. 45 degrees; that would be safe.

[fol. 95] Cross-examination.

By Mr. Cunningham:

Q. The angle would vary considerably according to what the lower end of the gangplank rested on?

A. Yes, it would vary; but a safe angle would be 45 degrees.

Q. An angle of 20 degrees would be very safe, would it not?

A. I don't think so; not if it was a gangway.

Q. 45 degrees is a greater angle than 20 degrees?

A. No, not for a gangway; the more acute the angle for a ladder, the safer it is, but the greater the angle on a gangway the safer the gangway is.

Q. That is 90 degrees, is it not (indicating)?

A. 90 degrees, yes.

Q. 45 would be about like that, would it not (indicating)?

A. Yes.

Q. Or the opposite way going down, that would be about 45 degrees, would it not (indicating)?

A. Well, yes.

Q. And 20 degrees would be about like that (indicating)?

A. Yes, and for a gangway that would be the safer.

Q. Then the gangway that rests at a 20-degree angle would be safer, would it not?

Mr. Axtell: He is figuring the other way.

A. No, I probably misunderstood you. I figured this would be a 20-degree angle and that would be a 60 or 70 degree angle (indicating); a 45-degree angle, the gangway would rest like this (illustrating). That would be the safest for a gangway, and the more acute the angle the safer it would be for a ladder.

[fol. 96] Q. We are talking about gangways.

A. Well, for a gangway 45 degrees should be a safe angle.

Q. And if the angle was about 20 degrees it would be much safer?

A. Yes.

Q. Of course, the degree would vary with whether it rested on the deck or on something you had placed on the deck, and raised the lower end of the gangway higher, would it not?

A. Yes; if you have——

By the Court:

Q. If the gangplank rested on something which rested on top of the deck would the angle be greater or less than if it rested on the deck?

A. It would be less.

By Mr. Cunningham:

Q. You have heard of the Sea Service Bureau of the United States Shipping Board?

A. Yes.

Q. And you know that is the universal Sea Service Bureau which regulates the personnel of the ships of the Shipping Board?

A. Yes.

Q. And you know before a man below the grade of officers can get a job on any of the ships he has to go and apply to the Sea Service Bureau? You know that, don't you?

A. No, let me explain this to you——

Q. No, do you know it or don't you?

A. Yes, I know it.

Q. Is it a fact that in order to get a job as boatswain or any of the grades below that of officer—speaking of the deck squad—is it a fact or not that he must obtain the job through the Sea Service Bureau?

A. He must obtain their O. K.

[fol. 97] Q. In other words, he goes through the Sea Service Bureau?

A. Before he goes on——

Q. You can answer yes or no?

A. Yes; but there are different ways of answering.

Q. He has to go through the Sea Service Bureau?

A. Where there is a Sea Service Bureau, yes.

Q. Do you know whether or not there is one in Jacksonville?

A. I couldn't say.

Q. Do you know whethere there was one there in 1920?

A. I have not been there.

Q. So if they applied to the Sea Service Bureau and had been accepted, they are given a slip?

A. Yes.

Q. Which slip they present to the chief officer or the master when they come on board a ship?

A. Yes.

Q. And until they present that slip they can't get a job on the ship, can they? Yes or no?

A. Well, they don't go on the payroll, no.

Q. If they don't go on the payroll they are not very much interested in the job, as a general rule, are they?

A. No.

WILLIAM WAYMAN, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Axtell:

Q. What is your occupation?
A. I am a mate; chief mate.
Q. How long have you been going to sea?
A. For about 16 or 17 years.
Q. In what capacity?
A. All capacities; I went from sailor up.
[fol. 98] Q. From ordinary seaman?
A. From ordinary seaman, yes.
Q. Did you go as a deck boy once?
A. Yes.
Q. How old are you now?
A. I am 32 years of age now.
Q. Where were you born?
A. I was born in New York.
Q. Have you sailed in any vessels of the Shipping Board?
A. Yes, sir.
Q. About how many?
A. I think about 7 or 8.
Q. What tonnage?
A. Well, they vary; anywhere from about 2,000 tons to about seven or eight or nine thousand tons.
Q. In what trade?
A. Coastwise and foreign.
Q. Have you been in private vessels?
A. Yes.
Q. How many?
A. About a dozen.
Q. I mean in any service?
A. I was on private vessels for about 10 or 12 years.
Q. How many vessels were you in during that time?
A. I couldn't tell you how many, but I think about 15, or maybe 12 or so.
Q. Have you observed whether there is any general custom or practice with regard to getting men for the deck department in ports through the agency of the boat?
A. Yes.
Q. What is the practice?

Mr. Cunningham: Objected to unless he has had experience on Shipping Board vessels.

The Court: He testified he had had experience.

Q. Well, tell us what the names of the Shippnig Board boats you were on are, and the dates and the capacities in which you were employed?

[fol. 99] A. I couldn't say the exact dates, but I can say the vessels. The steamship "Freedom," I was on her in 1918 as second mate; the steamship "Goodspeed"——

Q. How big was the "Freedom"?

A. The "Freedom" was about 3,000 tons.

Q. Now the Goodspeed?

A. She is a lake type vessel about *about* 2,400 tons. I was on her as second mate and mate, in 1920. The steamship "Wynooche," as second mate in 1921, second and first mate, and the steamer "West Lake" in 1922, and the steamship "Sabatawan."

Q. That boat runs to South Africa?

A. Yes, but not when I was on her; that was recently.

Q. When were you on those ships?

A. On the "Sabatawan" I was in 1926, and only a few months; that is about all I can think of.

Q. Do you know whether you had been on any others or not?

A. I was probably on a couple or so more.

Q. Have you been on board vessels that you did not work on?

A. Yes.

Q. Do you know a great many merchant marine officers who have been on Shipping Board boats?

A. Yes.

Q. Do you know the general custom and practice prevailing with regard to the way they collect their crews?

A. Yes.

Q. Will you tell the Court and jury what was the custom in the past year with regard to permitting a boatswain to act as an agent?

A. When a mate is short a few men, one or two or three, he usually asks the boatswain if he knows anybody that would take their place. The boatswain has got authority to go and get some men. He goes ashore and meets somebody who wants a job and puts them to work.

[fol. 100] Q. Are they employed subject to the approval of the mate?

Objected to as leading.

The Court: Objection sustained. Let him tell about it.

Q. Is there any custom or practice in vogue on American ships with regard to permitting members of the deck crew to go ashore when in port?

A. Yes.

Q. Is there anything with regard to permitting or forbidding visitors to come on board?

A. If there is, they usually put a sign up at the gangway.

Q. If there is no sign up what is the rule?

A. You can just go ahead and visit.

Q. In other words, a sailor's ship is his home?

A. Yes.

Q. He lives there and has his clothes there?

A. Yes.

Q. In a locker?

A. Yes.

Q. And he keeps his stuff locked up?

A. Yes.

Q. And he gets his food there?

A. Yes.

Q. He is supposed to be on board the ship at all times except when he is permitted to be absent?

Objection to.

Objection sustained.

Q. One other question. When a vessel is lying alongside of a vessel that is next to a ship and the outside vessel is 8 or 10 feet lower than the inside vessel and it is necessary to cross the vessel to get to the deck of the outside vessel, what is the usual means provided for getting from one deck [fol. 101] to the other, bearing in mind that the deck level at the place where the contact is made, is 8 or 10 feet?

A. They usually have a gangway, a few planks of special make, about 35 feet long, and they put extensions and life ropes on.

Q. Is that carried with the ship?

A. Yes.

Q. It is something you don't make afterwards; you carry it with you?

A. Yes; it is made.

Q. It is a regular part of the ship's equipment?

A. Yes.

Q. Do you know whether American ships are usually so equipped?

A. Yes.

Q. How many do they have?

A. They usually have two; in case that one gets damaged they can use the other.

Q. Do the ships carry any other gear besides that, for that purpose?

A. They do; they carry a ladder. They carry an accommodation ladder.

Q. That goes over the side to let the visitors on board the boat?

A. Yes.

Cross-examination.

By Mr. Cunningham:

Q. You never saw a 35-foot gangway on a ship in your life, did you?

A. Yes, I did.

Q. What ship?

A. I can't tell you exactly the ship.

Q. What kind of gangplank do they use on big passenger ships?

A. On a freighter they use them.

Q. What freighters can you name?

A. The Luckenbach Steamship Company. You will see one on every ship, 35 feet long and more. You have got to have a boom to lift one of them up. It takes 15 or 20 men to lift one.

Q. They weigh about 3,000 pounds?

A. Oh, no; a crew of about 10 men handles them.

[fol. 102] Q. Do you mean to say they won't weigh around 3,000 pounds?

A. No.

Q. How much should you say they weighed?

A. I don't know exactly, but they probably weigh about 1,000 pounds or so.

Q. Did you ever see such a plank used to bridge the gap between two ships which were moored next to each other one being next to the wharf?

A. Yes; they usually use a solid gangway.

Q. They use a 35-foot gangway?

A. Yes, if they have one.

Q. Did you ever see any such gangplank used in all your experience at sea to bridge the distance between two ships which were 18 or 20 inches apart?

A. It depends on the distance between the two ships.

Q. With a distance of about 18 inches, should you say you ever saw a 35-foot plank used for that gangway?

Objected to, unless the height is named.

Q. And the height or the distance from the boat deck of the ship which sits lower in the water to the saloon deck on the ship which is next to the pier is higher, is only a matter of 8 to 10 feet. Did you ever see a 35-foot gangway used in such cases?

A. No, they would probably use something about 18 feet long.

Q. Would they saw the 35-foot gangway in two?

A. No, they would put a carpenter to work to make one.

Q. A deck carpenter usually makes them of 2 or 3 12-inch planks, does he not?

A. Yes, any thing he can find.

Q. He makes them of wooden planks nailed in cleats about 18 inches apart?

A. Yes.

[fol. 103] Q. And one end of that gangway is usually lashed to the upper deck, the higher deck of the two ships?

A. Yes.

Q. And thel ower end is allowed to rest on the ship which is left unlashed in order to give it a little play so that the ship may swing back and forth with either the tide or with the swash of the waves as some steamer goes alongside?

A. Yes.

Q. That is the practical way it is done, isn't it?

A. Yes.

Q. The rise and fall of the tide has no effect on the play of that end of the plank, because of the fact that it affects both ships alike?

A. Yes; but it has got to be much longer than the distance between the two ships. It has got to be much longer. If they were say 8 feet apart the plank must be 16 feet long.

Q. And if the ships are 18 inches apart on one deck, the upper deck, the distance from the upper deck to the lower deck is about 8 or 10 feet at the most, a plank 12 feet long would be ample, would it not?

A. No, it would not.

Q. Are you sure?

A. Absolutely. It has got to be plenty long enough.

Q. As chief officer did you ever hire any men when you were on a Shipping Board vessel?

A. Yes.

Q. Were they members of the deck department?

A. Yes, they were members of the deck department.

Q. Did you hire them in ports where there was a Sea Service Bureau of the United States Shipping Board?

A. I did in 1920; and about 1918 and 1917 I did.

Q. When men come on board under those conditions they [fol. 104] come through the Sea Service Bureau?

A. Yes, they usually have a slip.

Q. And if they don't have a slip you don't hire them?

A. Yes, I could.

Q. What happens to you if you do?

A. Nothing, because at that time the Shipping Board didn't have very many men ashore, and if they need men on they would say to go ahead and get them.

Q. Do you mean to say that as first officer of a Shipping Board vessel in 1920 you dared to hire men who didn't come with the slip from the Sea Service Bureau, in a port where there was a Sea Service Bureau?

A. Yes.

Q. Did he go on the payroll in those cases?

A. Yes; I would usually make the payroll out.

Q. You hired men without an O. K. of the Sea Service Bureau?

A. No; they were not logged at that time, but they had the necessary papers to show that they were able seamen.

Q. They had to have the papers which showed that they had gone to the Sea Service Bureau and had passed a physical examination, before they could be hired?

A. Not always.

Q. Isn't it a fact that on United States Shipping Board vessels no man can pass the Shipping Board service until he shows himself free from venereal disease?

A. Yes; he is supposed to.

Q. And that is one of the reasons why the Sea Service Bureau exists?

A. No, that is not the only reason.

Q. Isn't that one of the reasons?

A. No.

Redirect examination.

By M. Axtell:

Q. It is true that the Supreme Court of the United States has declared selection as to the thing that counsel is talking about?

[fol. 105] Objected to.

The Court: The witness has not qualified on the law.

Q. Isn't it a practice on the part of merchants that steamship owners in the Pacific Ocean and American steamship owners on the Atlantic coast try to prevent officers from selecting their men, and to compel them to take men from a Sea Service Bureau?

Objected to on the ground that the witness is not qualified to answer.

Q. And that rule has never been fully put into effect, has it?

A. It has not.

Gunner Peterson, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Axtell:

Q. What is your occupation?

A. Boatswain or able seaman or anything like that in any department on deck.

Q. How long have you been going to sea?
A. About 18 years.
Q. How many years have you been a boatswain?
A. I guess about 2 or 3 years.
Q. How many Shipping Board vessels have you been on?
A. I guess about 8 or 9; the "Saratoga," a Hog Island built boat, the "Alfonsonia," another Hog Island built boat, and the "Andrew Jackson," a Barber Line boat.
[fol. 106] Q. You mean operated by the Barber Line?
A. Yes, operated by the Barber Line, a Shipping Board vessel; the "Pleiades," a small boat of the Luckenbachs.

Objected to.

The Court: Objection sustained. Don't lead him.

Q. What is the tonnage of the "Pleiades"?
A. About 4,000 tons or 4,500.
Q. Tell us what other ships you have been on?
A. Of course, if I should tell them all, it would take a long time, but I guess I have been in about 200 ships. That is about all the Shipping Board boats, though.
Q. Has there been any custom or practice in those vessels including the Shipping Board boats of sending the boatswain to get men for the deck department when there would be one or two men missing? Yes or no?
A. Yes.
Q. Tell the Court and jury what is the practice, according to your experience.
A. In the "Andrew Jackson," when I was in her, I went with her to the Far East and I went and got my men from the Sailors' Union. I was sent up there to get the full crew, and I went and got them. That was in 1920.
Q. You are a Union man yourself?
A. Yes.
Q. What is the custom generally?
A. In the other ships I have been in, if there are one or two men short when the ship is ready for sea, the mate generally says, "Will you go ashore and find a man?" That is at the time of the sailing day that the boatswain goes ashore and gets one or two men.
[fol. 107] Q. Does it often happen that after your ship is ready you find a man missing?

A. That happens every day in the week; one or two men, and we have to go out and get a man often for a ship when the sailing day comes; they have to go out and get men.

Objected to.

Objection sustained.

Mr. Arndt: That is all.

Cross-examination.

By Mr. Cunningham:

Q. As a matter of fact, they send word to the Sea Service Bureau first that they need men?

A. When the ship first comes into port.

Q. And the Bureau sends word to your Seamen's Union that they need so many men?

A. Yes, but not all the time.

Q. And the Union sends men over to the Sea Service Bureau?

A. Yes.

Q. And after they have passed the Sea Service Bureau they present themselves at the ships, with their credentials, don't they?

A. Yes, then they go down there.

Lon Sorensen, being duly sworn and examined as a witness for the plaintiff, testified:

By Mr. Arndt:

Q. What is your occupation?

A. I sail as beginning as a sailor.

Q. How old are you?

A. 39.

Q. How long have you been going to sea?

A. About since 1911; about 18 years.

[fol. 116] Q. How much of the time have you been home?

A. Oh, about a year or a year and a half.

Q. Have you been in any Shipping Board boats?

A. I have been in four of them. The last one was the "Saugerties."

Q. What is her tonnage?

A. About 9,000 tons; and I was in the "Kittygan," a Hog Island ship, and I was in the "Lake Butler" and I was on the "Orleans."

Q. Any other Shipping Board boats that you remember?

A. No.

Q. Have you been on other American vessels?

A. Yes, I was on the "Luckenbach."

Q. Has there been while you have been going to sea as a sailor any custom or practice in vogue of permitting or sending the boatswain ashore to get men for the deck department?

A. Yes; I was hired in 1920 by the boatswain on a Shipping Board ship, the "Kittygan."

Cross-examination.

By Mr. Cunningham:

Q. You went through the Sea Service Bureau first?

A. Yes, I went right on board and worked.

Q. Did you sail that same day?

A. No, we didn't sail the same day.

Q. When did you sail?

A. About 4 days later, in 1920.

Q. You were never O. K'd by the Sea Service Bureau?

A. If I was, I must have been on board the ship when I signed on, because I didn't go in the office.

Q. When was that?

A. That was in 1920.

Q. Where?

A. In New York.

Q. The other cases when you signed on Shipping Board boats, did you go to the Sea Service Bureau first?

[fol. 109] A. Well, sometimes, when a Sea Service boat is in port.

Q. Where have you signed on in these cases where you signed on Shipping Board boats?

A. I signed in Mobile in the "Saugerties."

Q. You went through the Bureau then?

A. Yes.

Q. They examined you physically?

A. Yes.

Q. Where did you ship on other boats?
A. The "Lake Butler."
Q. You went through the Sea Service Bureau then?
A. No, I went right on board the ship.
Q. You expected to?
A. Yes.
Q. You got by without going to the Sea Service Bureau?
A. Yes; I shipped from a Shipping Office; a shipping master in New York sent me right on board, "Caverina."

Redirect examination.

By Mr. Axtell:

Q. There are times when the Sea Service Bureau can't get men?

Objected to on the ground that the witness is not competent.
Objection sustained.

Q. They have not got them?

The Court: What does he know about it?

By the Court:

Q. What do you mean about the lack of ability of the Shipping Board to get men?
A. In Mobile——
[fol. 110] Q. What do you know about it?
A. At the present time it is very good.
Q. They can get all the men they want at present?
A. Yes.

By Mr. Axtell:

Q. In 1920 how was it?
A. They put anybody they could pick.
Q. There was a big strike in 1920 and wages dropped about 30 per cent., didn't they?
Objected to.

By the Court:

Q. Did you ever ship any men in Jacksonville, yourself?
A. No, sir.

Q. Did you ever ship yourself from Jacksonville?

A. No, sir.

Q. Do you know anything about the number of men that can be obtained in Jacksonville?

A. Yes.

Q. How do you know?

A. I know that in the summer time we can ship at almost any time.

Q. Were you ever there?

A. Yes, I was in Jacksonville.

Plaintiff rests.

Mr. Cunningham: I will reserve my motion till a little later.

[fol. 111] TESTIMONY FOR THE DEFENDANT

IRVING L. EVANS, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Cunningham:

Q. You are at present one of the vice-presidents of the United States P. & I. Agency of the Shipping Board?

A. I am.

Q. Located at 45 Broadway?

A. Yes.

Q. Have you been such for the past 4 years?

A. That is correct.

Q. Is that one of the agencies which has to do with the investigation of injury matters and cargo claims?

A. It is.

Q. Prior to that time were you connected with the Shipping Board?

A. I was.

Q. In what capacity were you connected with the Shipping Board?

A. I was the foreign director of their Recruiting and Training Service which had to do with the seeing of officers and men both licensed and unlicensed and placing the officers and men on ships throughout the United States.

Q. Did the matter of the Sea Service Bureau fall under your jurisdiction?

A. Yes; that was part of the service of which I was the head.

Q. Will you describe the Sea Service Bureau?

A. May I be permitted to describe the service to show what it constituted?

Q. Yes.

A. The Recruiting and Training Service for the Shipping Board——

Mr. Axtell: I object; that is too general.

Objection overruled. Exception.

[fol. 112] A. (Continuing:) —maintained navigation and engineering schools at some of the leading universities and colleges of the United States, where they taught navigation to officers and engineering to men who had become engineers, and for men who had a license already and wanted a higher grade of license. In addition to the navigation and engineering schools we had special schools at the Westinghouse and General Electric plants, where we sent licensed chief engineers and a few licensed first assistant engineers who were qualified by experience, and were picked because of their expert knowledge and training, and they were sent there to study turbine engines.

The Court: We have gone far afield. We want to get down to this case.

Mr. Axtell: I move to strike out that answer as not material or relevant.

The Court: I will strike it out.

Q. In the course of developing that service did you also develop a service with reference to the men known as able seamen and ordinary seamen?

A. Yes; and that was the Sea Service Bureau.

Mr. Axtell: I object, that the witness is not qualified to answer.

Objection overruled.
Exception.

Q. When was that service developed?

A. It was established during the war and had offices in all the principal American ports for the purpose of placing men on Shipping Board vessels.

Objected to.

[fol. 113] By the Court:

Q. What were you at that time?

A. I was the foreign head of their work and had charge of the establishing of those offices and maintaining them, and hiring all the men to run them and what men should work them from each office.

The Court: Objection overruled.

A. (Continuing:) The service was that we maintained an office in each of these principal ports where we had waiting rooms for the men to come in and wait for vessels, and as the officers of ships wanted a crew the agent or manager of the office was notified and he selected and sent to the ship the men for the positions which he had been asked to fill.

By Mr. Cunningham:

Q. Was there any regulation which governed the officers, master or chief mate of the ship, with respect to filling vacancies on his ship?

A. Yes.

Q. What was it?

Mr. Axtell: Objected to on the ground that it is not shown that that was in effect in Jacksonville at that time.

By the Court:

Q. Were they in effect in 1920?

A. Yes.

Q. Generally?

A. Generally.

Objection overruled.

[fol. 114] By Mr. Cunningham:

Q. Was there a Sea Service Bureau in 1920 in service in Jacksonville, Florida?

A. Yes.

Q. Who was at the head of that Bureau?

A. Mr. C. W. Sanders.

Q. Is he in the room now?

A. Yes.

Q. Was there a regulation which governed the masters of ships in the matter of filling vacancies in their crews?

A. Yes; to the effect that it applied to the companies as well as the officers of the ship. The companies were notified that they should not permit the officer or master of any Shipping Board vessel to employ any men through any agency or source other than the Sea Service Bureau. That applied to all officers and men except the master.

Q. So that under the regulations of the Shipping Board to the master the personnel of the crews had to come through a Shipping Board Sea Service Bureau where there was a Sea Service Bureau at any point?

A. Yes.

Q. And that was true of Jacksonville, Florida, in 1920?

A. That is correct.

Cross-examination.

By Mr. Axtell:

Q. Were you ever in Jacksonville?

A. Many times.

Q. Were you there in 1920?

A. Yes.

Q. Were you there working in the offices there?

A. No, sir, I had charge of the foreign headquarters. There was an office in New York and one in Washington.

Q. Have you ever been an officer in the American Merchant Marine?

A. Yes.

[fol. 115] Q. How long?

A. I hold an unlimited master's license for ocean steam vessels.

Q. Did you serve?

A. I served for 14 years at sea, from apprentice boy to master.

Q. Where did you come from?

A. Southern Maryland, St. Mary's County.

Q. Did you ever send a boatswain ashore to get a man for you?

A. I believe I have, yes.

Q. When the man has come on board on the boatswain's recommendation, you have hired him?

A. If he had the qualifications that I thought he should have as an officer of the vessel.

Q. You are familiar with the labor situation that existed in 1920 and 1921?

A. Yes, I am quite familiar with it.

Q. Up to 1921 there was more or less labor shortage?

A. No, sir, we had at all times about 800 to 1,000 men available extra, whom we had trained on the training ships. At times there was some shortage in 1919.

Q. There was a time when there was a terrible strike and the engineers and officers all went out because some men were getting $33 and some of the other officers were only getting $31?

Objected to.

The Court: You cannot go into this line of questioning. We are not trying any strike.

Q. The sea Service Bureau was formed to combat the organization of the officers and men, was it not?

A. It was not; it was formed during the war for the purpose of seeing that no aliens got upon the ships carrying troops and supplies for us.

Q. Wasn't there a man by the name of Howard in Boston [fol. 116] that started the Sea Service Bureau?

A. Mr. Howard during the war was the foreign head of this same service, in which I succeeded him, and I was associated with him in the formation of it.

Q. The purpose was to get young Americans to go to sea?

A. Yes; at the time it was established, yes.

Q. You did have offices in New York and some of the principal ports of the United States?

A. Yes.

Q. What are they?

A. I can't tell you because I have nothing to do with it, but I can tell you what they were in 1920.

Q. There have been times when the Sea Service Bureau couldn't get men and they had to send to the Union halls to get them?

A. There may have been times before 1920, yes; during the war there were.

Q. Up to that time the Shipping Board adopted a rule to permit Union delegates to visit the men on board the ships?

A. That has never been prohibited.

Q. They have always had the right to do that?

A. They have always had a right to visit their members on the ships.

Q. They have been given passes?

A. They have been given passes for that purpose always, during the war.

Q. It has been the practice to allow other union men to visit their comrades on board the ships?

A. Not generally; some persons were permitted to visit the ship who were issued passes for that purpose.

Q. But if you were a reputable person and wanted to visit somebody on board a ship, you would go down, and [fol. 117] if you were properly introduced to the watchman at the dock you could go on board?

A. No, sir.

Q. Not if you were properly introduced to the watchman at the dock?

A. I don't know what you mean by being properly introduced.

Q. There might be a pass required?

A. The man would not be permitted to go on board if he had not a pass.

Q. Would an officer of the ship be permitted to take a man on board the ship with him?

A. If he had proper credentials, yes.

Q. Would an officer have to go to the Sea Service Bureau to get a pass?

A. I am not in the operating department. I am handling the personnel only.

Q. When you were going to sea how was it?

A. I don't think I ever had any difficulty in taking a friend on board a ship if I wanted to.

Q. The boatswain is a petty officer, isn't he?

A. Yes.

Q. You know that he has been defined by the Courts as an officer, don't you?

A. He is a petty officer, yes.

Q. And the boatswain has authority to take a visitor on board a ship if he is a seaman and works, and of good character, to visit him in his room?

A. I don't know about that; that would depend on what the officer had permitted on a ship.

Q. In your experience in American vessels going to foreign ports and into ports of the United States on the coast, when the men are not permitted to go ashore, what is ordinarily done to apprise them of the fact?

A. Sometimes a notice is put up and sometimes the man [fol. 118] at the gangway prevents them from going ashore when they come to the gangway.

Q. About men coming on board a ship, where a ship is lying at the dock where there are watchmen at the ends of the piers, all access to the ship must be through the watchman's gate; what is the rule about allowing them to come on board?

Objected to as incompetent and irrelevant.

The Court: He may answer.

A. It depends on where the ship is lying, whether it is at some wharf where visiting is prohibited or where there is a watchman of some shipyard or Navy Yard. It depends on the conditions.

Q. If visitors are not permitted to come on board a vessel and visit the crew is it customary to put up a notice to that effect?

A. Sometimes that is done and at times it is not done. It depends on the circumstances and conditions.

Q. In other words, a rule may be given verbally or in writing?

A. Yes.

Q. But if there was no rule the understanding would be that a seaman could have visitors on board?

A. I would not say that that would be the understanding.

Q. Certain kinds of visitors are prohibited from going on board, such as runners for boarding houses, sellers of clothing and solicitors, etc.?

A. They are still, so far as possible.

Q. But that rule does not apply to the ordinary longshore visitor or seamen?

A. I should say yes, it does.

Q. Suppose two vessels are lying at the same pier, or three or four or five, they might be in Buenos Aires or New [fol. 119] York or Brooklyn or Jacksonville. Should you say there would be any rule ordinarily against the crew or some of the crew of one ship talking with the other one when they are not on duty?

A. No.

Q. They would be permitted to do that?

A. Yes; ships lying alongside of each other frequently visit back and forth.

Q. In other words, in American shipping today we are trying to give the men a pleasant place to live and make their quarters rather harmonious and try to make life a little pleasanter for them?

A. Yes.

Q. That was part of your work in the Sea Service Bureau, to induce Americans to go to sea, with the idea that the sea life was good for men?

A. I spent about five years of my best efforts to get our ships manned by Americans and to improve their conditions on board ship.

Q. And now you are a member of the United States P. & I.?

A. I am a vice-president.

Q. That is to defend these suits?

A. No; we deal with them and have to represent the Government in handling them.

Q. You are in control of the corporation by whom Mr. Cunningham is employed?

A. Mr. Cunningham is not employed by the corporation that I am in.

Q. Your interest in this case is to help the defendant to win, isn't it?

A. No, I am here to tell the truth about what I am asked.

Q. You are here as a witness for the defendant, and you are not under subpœna nor are you paid for your services?
A. No, sir.

[fol. 120] CHARLES W. SANDERS, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Cunningham:

Q. What is your present business?
A. I am assistant director of the Bureau of Operations in charge of the Sea Service Bureau.
Q. That is for the United States Shipping Board?
A. Yes.
Q. Were you connected with the Shipping Board in August, 1920?
A. Yes.
Q. Where were you located?
A. I was local manager of the Sea Service Bureau at Jacksonville, Florida.
Q. What were the regulations with reference to supplying sailors on ships of the Shipping Board for vacancies; the same as today?
A. Yes.
Q. What were the regulations with reference to supplying men for the ships?

Mr. Axtell: I move to strike out "the same as today."

Motion denied.

A. (Continuing:) A ship arrives at the dock; the officers give the requisition to the master, the master gives it to the—this was in those days; not now, remember—they give the order to the managing operator, and the managing operator in turn would give it to the Sea Service Bureau.
Q. When you speak of the managing operator you mean that particular company that was operating the particular ship for the United States Shipping Board at that time?
A. Yes, for the Fleet Corporation.
[fol. 121] Q. Do you remember the American Shipping Corporation that was one of the corporations which was operating from Jacksonville, at that time?

A. Their home office is in "Jacksonville."

Q. They operated the ship "Jacksonville" at that time?

A. Yes, they took it from the ship yard.

Q. Do you remember the "Jacksonville" being at Jacksonville while you were in charge of the Sea Service Bureau there in August, 1920?

A. Yes; I remember the day it was launched.

Q. How were the members of the crew supplied to the "Jacksonville" at that time?

A. They were all through our office.

Q. What was the method adopted by able seamen or ordinary seamen of obtaining a job on the "Jacksonville"?

A. We would come to the office through the operating company, either through their marine superintendent or port engineer. We would select the man and send him to the ship.

Q. The operating company would send word to the Sea Service Bureau that they had been notified that such men were needed for their crew?

A. Yes.

Q. Would those men come to the Sea Service Bureau?

A. If the men were not available in our marine department we used a board, a sort of a bulletin board, and would write up there the number of men that we wanted. If they were not obtainable and didn't come around, we would send out one of our men and he would pick up the men at the sailors' boarding house or the Union Hall.

Q. Did those men that they found have to come to the Sea Service Bureau first?

A. Yes.

[fol. 122] Q. After they came there what was done with them?

A. The card record was made of each man; if an able seaman, the number is A. B. This was recorded on the card which we kept on file of that special seaman, and if approved—if there was nothing against his record, he was sent to the ship.

Q. Do you keep a complete record to show the record of each individual seaman who applied there?

A. Yes.

Q. Was it the regulation to look up these records to see if they were clean?

A. Yes.

Q. Did you go any further with respect to their physical make-up?

A. At that time we did not, not in all ports. In Jacksonville it was not carried on unless the master requested it. If he requested it, we did it.

Q. Did you have a physician to conduct that physical examination?

A. It was handled through the Public Health Service.

Q. That was the method by which Shipping Board vessels in Jacksonville in August, 1920, were provided with men?

A. Yes.

Q. Was there any other way by which the master or the mate directed by the master was permitted to fill any vacancy in his crew?

A. That was on what we call the pierhead jump; at the sailing hour. Our office might be closed and the master had authority to have his officers select their own men, which he would make a record of and give to the pilot going down the river, which would be mailed back to us.

Q. In other words, just at the point of sailing, if he found a vacancy or two in his crew, then he had that authority, to take someone, and send a record of that to your office?

A. Yes.

[fol. 123] Q. That was the only exception made to this routine?

A. Yes.

Cross-examination.

By Mr. Axtell:

Q. You testified in another case in which I was counsel, did you not?

A. Yes; one or two or three.

Q. Was that the Beaton case?

A. No, that was the Lynch case.

Q. Were you in Jacksonville then?

A. When?

Q. At the time you testified to the circumstances in that case?

A. No.

Q. You were in Philadelphia, weren't you?
A. Yes.
Q. And now you say you were in Jacksonville?
A. Yes.
Q. Those accidents were the same year, were they not?
A. I don't know; I can't remember.
Q. You had something to do with the black list, the deferred list?
A. We had nothing to do with a black list.

The Court: I want you to understand that my orders here must be obeyed. Confine yourself to this case, and if you repeat this I shall allow Mr. Cunningham to withdraw a juror.

Mr. Axtell: I would not have asked these questions had I not thought it was all right. That is all.

Mr. Cunningham: I will first read the deposition of John K. Littlefield, taken pursuant to notice, on December 12, 1924, at Baltimore, Maryland (reads direct examination of said deposition).

Mr. Axtell: I do not think I need to read this cross examination.

[fol. 124] The Court: If you want to read it, now is the time.

Mr. Axtell: I will read one question on page 12.

Mr. Cunningham: I will read all that Mr. Axtell does not read.

Mr. Axtell (reading):

"Q. You did not supervise the erection of any of the appliances in connection with the gangway plank?" * * *
"A. No more than passing over it."

(Take in the rest of the question and answer.)

Mr. Cunningham: I will read the rest of the cross examination.

(Mr. Cunningham reads also the redirect examination.)

DEPOSITION OF J. K. LITTLEFIELD

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DECEMBER 12, 1924

JOHN JOHNSON, Plaintiff,

against

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant

Deposition of the witness J. K. Littlefield, taken pursuant to the attached notice before me, Lafayette P. Temple, a notary public in and for the city of Baltimore, State of [fol. 125] Maryland, on this 12th day of December, 1924, at the offices of Messrs. Coleman, Fell, Morgan & Brune, Citizens National Bank Building, Baltimore, Maryland, beginning at 2:30 o'clock, p. m.

Present in behalf of the plaintiff: Silas B. Axtell (by Mr. Harry Perlin).

Present in behalf of the defendant: Messrs. Coleman, Fell, Morgan & Brune (by Mr. Frederick Brune).

(NOTE.—It was agreed by and between counsel for the respective parties that the signing, sealing and certification of this deposition should be waived.)

Thereupon—

JOHN K. LITTLEFIELD, a witness of lawful age, produced on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct examination.

By Mr. Brune:

Q. Please state your full name, your age and your occupation.

A. My name is John K. Littlefield; age, forty-five; occupation, marine officer.

Q. You are now second officer of the "Thomas P. Beall"?

A. Yes.

Q. For how many years have you been following the sea?

A. About thirty-seven years.

Q. How long have you been an officer?

A. About twenty-three years, maybe a little longer.

Q. On August 1, 1920, were you or not first mate of the steamship "Jacksonville"?

A. Yes.

[fol. 126] Q. And at that time she was in the port of Jacksonville, Florida?

A. Yes.

Q. When did you join that vessel?

A. As near as I can recollect, I took charge as mate about the 28th of July. I will not be absolutely certain about that; it was either the 28th or the 29th.

Q. Where was the "Jacksonville" lying at that time?

A. She was lying alongside of the steamship "West Compo," at Commodore's Point, Jacksonville. I think it was the Jacksonville Outfitting Company or some such name.

Q. And the "West Compo" was lying alongside of the bulkhead at that plant, was she not?

A. Yes.

Q. At that time it was a part of your duty, was it not, to see that the crew was a full crew?

Objected to as leading.

A. Yes.

Q. Who was the boatswain at that time?

A. I think his name was John Anderson, or John Johnson, some such name; I couldn't tell you what his name was because I don't recollect.

Q. Does the name Carlson seem familiar to you?

A. That is th- eman, Carlson.

Q. On August 1, 1920, did the "Jacksonville" have a full crew?

A. To the best of my knowledge, yes. I do not recollect that she has any.

Q. If any one had been charged with the securing of additional men, who would have had that duty?

A. Myself.

Q. Did you instruct any one to try to procure additional members of the crew?

A. I did not.

Q. Do you know the plaintiff, John Johnson?

A. No, sir.

Q. You never saw him on board the "Jacksonville"?

A. No, sir.

[fol. 127] Q. Had you been ashore on the evening of August 1, 1920?

A. Yes.

Q. About what time did you come back to the ship?

A. I did not come back until morning.

Q. At the time when you joined the "Jacksonville," where was she lying?

A. Alongside of the steamship "West Compo," moored alongside of her.

Q. Was there any means of passing from one ship to the other at the time you joined the vessel?

A. Yes, there was a gangway from our boat deck on top of a vegetable box, which sat on the starboard side of the "Jacksonville," boat deck, on top of this vegetable box, if I remember right. Of course I could not tell you the exact dimensions of the plant, but I should judge it was from twelve to fourteen inches, three planks from the top of the vegetable box to the bridge deck of the "West Compo," with some cleats nailed across them.

Q. About how many cleats were there, do you remember?

A. That I could not say, but I judge they were two feet apart, or something like that.

Q. How was this gang plank secured?

A. Tied with ropes to the "West Compo."

Q. How long did it remain in that position?

A. It remained in that position—well, it was there when I joined the ship and it remained there until we moved the ship up alongside of another ship called the "Red Mountain," some few days after that.

Q. That is after the accident to Johnson?

A. Yes, we were taking oil and there was not water enough where we lay, so we moved the ship alongside of a ship called the "Red Mountain."

[fol. 128] Q. Was there any work being done on board the "Jacksonville" while you lay alongside of the "West Compo"?

A. Yes, she was undergoing repairs.

Q. Was there more than this one gangway between the "Jacksonville" and the "West Compo"?

A. No, sir.

Q. About how many men would you say passed over that gangway each day during the time that you lay alongside of the "West Compo"?

A. There was our full crew and I should say there must have been at least sixty men working on the ship. Of course I could not say definitely.

Q. Sixty men in addition to the crew, do you mean?

A. Yes, in addition to the crew. They had all the deck winches up and undergoing repairs in the engine room to her steering engine and they had her rudder out.

Mr. Perlin: I move that the last statement be stricken from the record as irrelevant.

Q. How many men were there in that crew?

A. If I remember right, there were thirty-seven men, but I will not be certain of that. I could tell you if you will let me count them up.

Q. That will not be necessary, I do not think. Do you know of any accidents that happened in connection with that gangway?

A. Only this man that I understood slipped off of it, fell off of it.

Q. That is John Johnson, the plaintiff?

A. Yes.

Q. Was any change made in the rigging of that gangway after that?

Mr. Perlin: I object to that as irrelevant.

[fol. 129] A. No, sir.

Q. How much longer did the ship lie there?

A. I could not tell you just the number of days. I think she lay there alongside of that ship about four days after that before we moved up to the next ship.

Q. Was there any hand rails, or anything of that sort on this gangway?

A. Only a heaving line between the two ships.

Q. Do you remember how that was rigged?

A. That was tied from the rail of the "West Compo" down onto the boat davit or alongside of our rail on this vegetable box.

Q. And it was tied in such a way that any one using the gangplank could hold on to the heaving line?

A. Oh, yes, if they wished to.

Q. About what angle was that gangway on?

A. We were loaded and the "West Compo" was light, and this gangway went from the top of our boat deck onto this vegetable box. It was about that high, I guess (indicating).

Q. Four feet high?

A. About three and a half feet or four feet high. And it went from the top of that and I should not judge it was over fifteen degrees angle.

Q. Where was the upper end, on your boat or on the "West Compo"?

A. On the "West Compo."

Q. About what was the length of the gangway?

A. I should judge it was about ten or twelve feet long.

Q. And you know of no other accident that occurred in connection with that gangway?

A. No, sir.

Q. You never saw John Johnson after the accident, did you?

[fol. 130] Mr. Perlin: That is objected to as irrelevant.

A. No, sir.

Q. When is your ship, the "Thomas P. Beall", to sail?

A. Tomorow.

Q. Where is she bound?

A. Boston.

Q. Where will she go from there?

A. From there to New York and then to the Pacific Coast ports.

Q. About how long do you expect the voyage to take?

A. Usually about three months.

Q. You only visit New York as a port of call?

A. Yes.

Q. You will not be there but a day or two?

A. Sometimes one day and sometimes as high as four or five.

Cross-examination.

By Mr. Perlin:

Q. You say you never saw John Johnson?

A. No, sir.

Q. Were you on board the vessel on August 1, 1920?

A. Yes.

Q. Did I understand you in answer to one of Mr. Brune's questions to say that you were on shore the evening of that day?

A. Yes.

Q. When did you leave the vessel?

A. Some time after supper; I can not say just the hour.

Q. When did the accident to Johnson occur?

A. That occurred some time in the early evening, before dark. I could not tell you the exact hour of that because I don't remember.

Q. Where were you at the time of Johnson's injury?

A. At the time he was hurt I was ashore.

Q. How long was this vessel docked alongside of the [fol. 131] "West Compo" before the injury to Johnson?

A. That I could not say because she was there when I joined the ship and I do not recollect how long she had been there, several days, I think.

Q. Did you sign the articles at Jacksonville?

A. Yes.

Q. Was this gangplank already erected when you joined the vessel?

A. Yes.

Q. You do not know, then, who erected the gangplank?

A. No, I do not. I suppose the officer on relief, or else, perhaps he oversaw it. I could not say who erected it because it was there when I came on.

Q. You did not supervise the erection of the gangplank?

A. No, sir.

Q. You did not supervise the erection of any of the appliances in connection with the gangplank or any of the attachments thereto, did you?

A. No, sir.

Q. You never personally examined the gangplank to see that it was properly put up?

A. No more than passing over it.

Q. It was not your duty to examine minutely the manner in which this gangplank was constructed, was it?

A. It was my duty if I saw anything that was neglected or anything that was not proper to see that it was put in condition.

Q. But you never made any definite examination of the gangplank?

A. No more than looking at the gangway after the accident. I did not see anything to make any change in that I saw.

Q. How many days after you joined the vessel did this accident occur?

A. It was only a few days from the time I went down there. I think I relieved Mr. Irwin, either on the 27th or [fol. 132] the 29th of July.

Q. Mr. Irwin was your predecessor?

A. Yes.

Q. You did not return to the "Jacksonville" until the morning of the 2nd of August, is that correct?

A. The following morning, yes.

Q. Immediately after the accident to Johnson, you do not know what changes were made to the gangplank?

A. No, none as far as I could see.

Q. If any changes were made you do not know about them?

A. No, sir.

Q. In other words, changes might have been made without your knowledge?

A. Not very well, no.

Q. Who was in charge of the vessel when you were ashore?

A. Captain Pindar, the night deck officer.

Q. Was there anybody else in charge?

A. Captain Pindar was the man in charge. At that time he was the responsible man. All other officers had the privilege of going ashore.

Q. A change in the manner in which this gangplank was laid might have been made under the Captain's orders during your absence, isn't that correct?

A. Certainly, the officer in charge of the ship could make any changes he saw were necessary.

Q. The point I am getting at is this, that it is possible for you to have been ashore and during your absence the Captain may have ordered some change in the laying of the platform after the accident to Johnson?

A. I could not say. None was ever reported to me and I never saw any.

Q. The captain would not have to report it to you if he did make a change, would he?

[fol. 133] A. If he made any change and an accident happened from it, it would have been his duty to report it, yes. He was supposed to give me all reports in the morning of whatever happened during the night.

Q. Who is Captain Pindar?

A. Captain Pindar was relief officer for the American Shipping Corporation that operated "Jacksonville" at that time.

Q. When you refer to Captain Pindar, do you refer to the master of the vessel?

A. Oh, no, sir. I refer to the night deck officer. The master of the vessel was Captain A. J. Pollard.

Q. Did Captain Pindar have anything to do with discharging or employing men?

A. None whatsoever.

Q. During your absence, could he discharge a man?

A. No, sir.

Q. During your absence could the master of the vessel, Captain Pollard, discharge a man?

A. He could if he was present at the ship, but he was not present.

Q. Captain Pollard was not present at that time?

A. No, sir.

Q. How could you get ashore from the "Jacksonville"?

A. We went up a ladder onto our bridge deck and then you stepped on this vegetable box. I forget just what you do to step up on the vegetable box. Then you went from this vegetable box on this gangway over onto the "West Compo."

Q. In other words, it was necessary to cross the "West Compo" for you to get ashore?

A. Yes.

Q. When did the vessel sail from Jacksonville?

A. If I remember right, it was on August 21st.

[fol. 134] Q. That is about twenty days after the accident to Johnson?

A. Yes.

Q. Did the same crew that signed on the vessel when you signed on sail with it on the 21st?

A. Yes.

Q. Exactly the same?

A. This boatswain that was there at the time, I discharged him before we signed on the ship's articles. He and one or two sailors. Then I got a new boatswain and one or two more sailors and the same crew that signed on the ship's articles went out.

Q. When did you discharge the boatswain?

A. About two or three days after this accident.

Q. Why did you discharge him?

A. Because he was not capable of doing his duty, he was drinking.

Q. Did you discharge anybody before you discharged the boatswain?

A. I don't think so. I would not say whether I discharged the sailors before I discharged him or not. I know at the time I discharged him I discharged a sailor and before I discharged him I think I also discharged a sailor.

Q. That was before you discharged the boatswain?

A. I think so, but I will not be positive.

Q. At the time of the accident, then, you were one or two men short?

A. No, sir, this was after the accident. The ship had a full complement of crew and officers when I went aboard of her, excepting myself and the first assistant who went down to join her.

Q. Did you authorize somebody to secure another man for you?

A. No, sir, I never did.

Q. Did you have any trouble with these sailors before you discharged them?

A. No, sir.

[fol. 135] Q. Then why did you discharge them?

A. Because they were not doing their work. If you wish to know the trouble I will tell you.

Q. I would like to know it.

A. This boatswain and some of the crew got to playing cards and drinking, as I understood. I watched him the

first day and it was about half-past one or a quarter of two when they were playing cards and I called him back and told him to get the men and get to work, that we worked proper hours there and I did not want any card-playing in working hours. He went forward to tell the men and they told him that he could go to hell, that he and the mate could go to hell, that they would turn to when they got through playing cards.

Q. This was before the accident?

A. After the accident, two or three days afterward.

Q. When you first joined the vessel did you have that same trouble, when you started to watch them?

A. I had only been there a day or two. I discharged no man until I saw that it was justifiable.

Q. Did you report to anybody your dissatisfaction with these men?

A. I did not, not to my knowledge, any more than I might have mentioned the fact to the second or third officer.

Q. It is possible, then, that they may have construed from your casual remark that you were in search of a man to replace them?

A. There was nothing said about discharging the men until, I think it was, three or four days after the accident.

Q. When Johnson went on board there to seek employment, did he ask for you?

[fol. 136] Mr. Brune: That is objected to. There has been no testimony that Johnson went on board seeking employment.

A. I never heard any question about it or never heard that he ever asked for me; I never heard that he ever asked for any officer.

Q. When he went on board you were not there, were you?

A. No, sir.

Redirect examination.

By Mr. Brune:

Q. You had seen this gangplank before the accident, had you not?

A. Yes.

Q. And you saw it after the accident?
A. Yes.
Q. Did you notice any change in it at all between the two times when you saw it?
A. No, sir.
Q. From your experience as a seaman, would you say that this gangplank was or was not rigged in the ordinary manner?

Mr. Perlin: That is objected to as the witness has not been qualified to answer the question.

A. I considered that the gangway was safe.
Q. Was it or was it not rigged in the usual manner?
A. It was rigged in the usual manner.

(Testimony of witness concluded.)
(Signature of witness waived by consent of counsel.)

[fol. 137] FRANK H. FLOYD, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Cunningham:

Q. Where is your home?
A. Mayport, Florida.
Q. Is that near Jacksonville?
A. 23 miles away.
Q. Have you come here now on my request by telegraph to testify in this case?
A. Yes.
Q. Your expenses are being paid through our offices while you are here?
A. Yes.
Q. Both your traveling expenses and for your time?
A. Yes.
Q. You testified in this case before a United States Commissioner in August last year?
A. Yes.
Q. Were you connected with the steamship "Jacksonville" in August, 1920?
A. I was deck engineer of the steamship "Jacksonville."
Q. How long had you been deck engineer of that ship on August 1st, 1920?

A. I signed on in July.

Q. Where were you when you signed on?

A. At the Municipal office at Jacksonville, Florida.

Q. So that the ship was at Jacksonville in the early part of July and all through August?

A. She was in there in July; I don't know about all through August.

Q. So early in July you joined the ship?

A. Yes.

Q. On August 1, 1920, do you recollect hearing about an accident to the plaintiff Johnson?

A. Yes.

Q. Did you see it or not?

A. No, sir, I did not.

Q. As far as the actual accident is concerned, you know [fol. 138] only what you heard?

A. Only by hearsay; that is the only way I knew anything about the accident.

Q. From the time you joined the ship up to the time of the accident to Mr. Johnson were you one of the crew of the "Jacksonville"?

A. Yes.

Q. How long did that last?

A. I don't remember exactly.

Q. When did you join the ship?

A. In July.

Q. You don't remember whether it was the middle part or the early part?

A. I don't remember the date, no, sir.

Q. Had you been on the ship upwards of a week or ten days?

A. Yes, sir; a week or more; I would not state the exact number of days.

Q. What was going on with respect to the ship and machinery at the time?

A. They were repairing the winches, the winches which they loaded the car on and off the ship.

Q. Those winches are located on which deck?

A. On the forward well deck, on the saloon deck there were two, and on the after well deck there were four.

Q. Were all those winches under the process of repair?

A. Yes.

Q. Who was repairing them?

A. I know the name of the foreman of the job, Mr. Treadwell, from the Jacksonville Outfitting Yards.

Q. Was there anything being done to the main engines of that ship?

A. I don't know; I was deck engineer.

Q. Did you at any time when the winches were being repaired go down into the engine room?

A. I never went below; very seldom.

Q. Do you know whether there was anything being done [fol. 139] toward repairing the steering gear of the engines?

A. I don't know.

Q. How many men were there working on this repair job?

A. Probably 40 or 50.

Q. Where did those men all come from?

A. From the ship yards.

Q. They came from the neighborhood of Jacksonville?

A. They were working at the shipbuilding concern.

Q. Was the dock near the yards?

A. The boat was laying on the dock.

Q. In order to get on the ship those men had to do what?

A. They had to come on board one ship and cross her deck and come aboard a gangplank on to the "Jacksonville."

Q. Was there any other gangplank between the two ships?

A. No, sir.

Q. Do you mean that was the only means of communication between those ships, and so on, to the shore?

A. Yes.

Q. Do you remember the construction of that gangplank?

A. Yes; this gangplank was made of three 10 or 12 inch planks; I don't remember whether they were 10 or 12 inches, and they were screwed together by cleats lashed to the deck of the other ship, and running down fitting on blocks on the deck of the "Jacksonville." This was the saloon deck of the other ship and the boat deck of the "Jacksonville."

Q. The boat deck was the top deck as the ship lay at Jacksonville at that time, was it not?

A. Yes.

Q. And the saloon deck was the nearest deck to the top deck on the other ship?

A. Yes.

Q. You say this gangplank consisted of three planks which were nailed together with cleats?

A. Yes.

[fol. 140] Q. How far were the cleats apart?

A. Somewhere around 17 or 18 inches.

Q. How long was the gangplank itself?

A. About 10 or 12 feet.

Q. About what angle did that gangplank rest at in connection with each ship?

A. Approximately a 15-degree angle.

Q. Will you illustrate by your hand about what you mean?

A. About at that angle (illustrating).

Q. Which end of the gangplank was lashed and which end was free?

A. The end of the "West Compo," the other ship, was lashed and the end on the "Jacksonville" was free.

Q. The end on the "Jacksonville" rested on what?

A. On a box.

Q. How was the gangplank lashed at the "West Compo" end of the ship?

A. I don't remember exactly, but I remember seeing it tied there and never noticed it particularly, just passing, and you would hardly notice a small thing like a lashing.

Q. You didn't do it yourself?

A. No, sir, I did not.

Q. Do you know who did put the gangplank there?

A. No, sir.

Q. Did you yourself use the gangplank from time to time?

A. Yes.

Q. Did you pass over it more than once?

A. Yes.

Q. Many times?

A. Yes.

Q. Did you notice other people passing back and forth over the gangplank?

A. Yes.

Q. Both the repair gang and the members of the crew?

A. Yes.

Q. How many members of the crew were there in the [fol. 141] ship?

A. Probably 40; I don't remember exactly.

Q. Did the crew have shore leave at this time?

A. Yes.

Q. Was there any skeleton crew to watch the ship at night?

A. There was always a watch on board the ship.

Q. Except for them, the rest of the crew was free to go ashore?

A. If they wished to, yes.

Q. So that upward of 100 men were using that gangplank going back and forth daily to and from the "Jacksonville" to the shore?

A. I would say I saw 100 men.

Q. About 60 repair men and as many as 40 members of the crew would use it?

A. Yes.

Q. Did you ever see any accident happen in that gangway?

A. No, sir.

Q. Did any other accident happen while you were on the ship in that gangway?

A. No, sir.

Q. Do you remember where the gangway rested on the steamer "West Compo"?

A. It rested on the side of the ship, right on the rail, on the deck; right down on to the deck of the "West Compo." It didn't come up on top of any rail.

Q. That is, illustrating this by the desk where the Court is, do you remember that this would be the deck of the "West Compo" (indicating the top rail)?

A. Yes.

Q. And that the gangplank rested on the deck itself?

A. Yes.

Q. Mr. Johnson testified the other day that the "West Compo" end of the gangplank rested on a rail about 6 inches above the deck, and not on the deck itself. Is his recollection the same as yours?

A. No, sir.

Q. He also said that in order to get on to the gangplank [fol. 142] when you came from the "West Compo" to go

down the gangplank to the "Jacksonville" that you had to climb over this rail, which he says consisted of the top rail and a middle rail. Was that necessary in order to get on that gangplank?

A. No, sir; there was an opening there.

Q. What sort?

A. Well, they placed an accommodation ladder there.

Q. Was it at that part of the other deck—what deck was it on, the "West Compo"?

A. It was the saloon deck.

Q. Was it that part of the saloon deck of the "West Compo" where they rigged an accommodation ladder when they placed it alongside of the ship?

A. Yes.

Q. Will you describe what you mean by an accommodation ladder?

A. That fits on the side of the ship and runs down and is swung over the side of the ship, and we come alongside and a man will come up the accommodation ladder.

Q. Is it the same thing where the people come up along the side of the other ship and step from an accommodation ladder on to the ship?

A. They come upon the accommodation ladder.

By the Court:

Q. And it is swung so that in swinging, when you come to the top, you can go on board?

A. Yes.

By Mr. Cunningham:

Q. When Mr. Johnson says that in order to get on the gangplank or on to the "West Compo" it was necessary to climb up a rail 3 or 4 feet high, his recollection is inac- [fol. 143] curate, according to your recollection?

A. It is.

Q. Have you any doubt in your own mind of your own recollection?

A. No, sir.

Mr. Axtell: I object and move to strike out all this testimony.

The Court: I will strike out anything that characterizes Mr. Johnson's testimony. The rest may stand.

Mr. Cunningham: I will reframe the question.

Q. Mr. Johnson has testified that when you got up to the "West Compo" end of the gangplank it was necessary to climb up over the railing of the "West Compo," which was about 3 or 3½ feet high. Does that change your recollection of the situation of the "West Compo" end of the gangplank?

A. No, sir.

Q. Did the men repairing the gangplank have occasion to carry any tools?

A. Yes, they used their own tools.

Q. How did they carry them?

A. Some in boxes and some in kits, the way most mechanics carry the tools.

Q. You saw these men go back and forth?

A. I know all those men do go back and forth.

Q. When you walk up on that gangplank does it swing or sway in the air at any time?

Objected to.

Objection sustained.

Q. Did you use the gangplank on August 1st, 1920?

A. Yes.

[fol. 144] Q. Did it on that day, did the "Jacksonville" end of it swing clear from that box on which you say it rested?

A. No, it did not.

Q. Will you look at this model which Mr. Johnson has shown us as the way in which this gangplank was rigged? Is that the way in which it was rigged?

A. No, sir.

Q. Did this "Jacksonville" end of the gangplank swing free in the air, suspended by anything, or did it rest squarely on the box?

A. It rested squarely on the box.

Q. Was there a heaving line attached alongside of the gangplank?

A. There was a heaving line on the gangplank, yes.

Q. How was the heaving line rigged?

A. The heaving line was rigged from the rail of the "West Compo" to a boat davit on the "Jacksonville."

Q. Did it pass through any stanchion on the gangplank?
A. No, sir.
Q. Was there any stanchion on the gangplank?
A. No, sir, none.
Q. Mr. Johnson has testified that there was a stanchion there in the position in which you see on this model here. Does the fact that he has so testified change your recollection of the way in which the heaving line was rigged from the "West Compo" to the "Jacksonville"?
A. Not a particle.
Q. How high was that vegetable box which was standing on the boat deck of the "Jacksonville"?
A. I should say approximately 3 feet.
Q. Do you remember how you got up on to the vegetable box where the "Jacksonville" end of the gangplank rested, in order to make the ascent of the gangplank?
A. No, sir, I don't remember clearly about that.
[fol. 145] Q. You may have stepped on some small box?
A. No, I don't remember how I got up there. Little things like that slip your mind in seven years.

Recess until 2 p. m.

Met pursuant to adjournment at 2 p. m.
Present: as before.

FRANK H. FLOYD resumes the stand.

Cross-examination.

By Mr. Axtell:

Q. Have you seen any plan of that ship which had a rail with an opening for the accommodation ladder on the boat deck?
A. No, I have not.
Q. Do you remember seeing any other ship that had an opening in the rail in that place?
A. Besides the "Jacksonville"?
Q. Yes.
A. Yes, sir.
Q. In that particular place?
A. Yes, sir, on the saloon deck.

Q. On which deck did these planks go to on the "Jacksonville"?

A. On the boat deck.

Q. How far from the funnel were they?

A. I don't know the exact distance.

Q. It wasn't very far, was it?

A. Well, not so awfully far; I don't know the exact distance.

Q. And the funnel is in the middle of the ship?

A. On some ships.

Q. I mean from between starboard and port?

A. Yes.

Q. That ship is about 54 feet beam, so it would be 9 feet thick anyway, the stack would?

A. I don't know.

[fol. 146] Q. Do you mean to say you don't know about the stack on that ship?

A. I don't know.

Q. Where did they carry the lifeboats on the "Jacksonville"?

A. On the boat deck.

Q. What deck did the planks go down to?

A. To the boat deck of the "Jacksonville."

Q. Then there were lifeboats there?

A. Yes.

Q. Do you remember there was a boat davit right in near where the planks came down?

A. Yes.

Q. Do you remember that there was a rope tied to the plank from the boat davit?

A. I remember a rope tied to the davit.

Q. Do you remember that there was a rope tied from the plank to the plank on the other side of it?

A. No.

Q. Would you say that it was when you went on Board there before the gangplank was rigged, so that the lower end was suspended in two ropes, or perhaps one rope running from the smokestack guy up to the end of the boat davit?

A. No, sir, I do not.

Q. Do you remember that there was a vegetable box there?

A. I don't remember a vegetable box; there was a box there.

Q. What is a vegetable box?

A. I don't know.

Q. How long have you been going to sea?

A. Approximately two years and nine months.

Q. Did you never see a vegetable box on any ship?

A. I may have.

Q. Did you ever hear of one?

A. I heard of a vegetable box, what vegetables were in.

Q. You are a sailor?

A. No, sir.

Q. You are in the engine room gang?

A. Yes, in the engine room gang.

Q. You have been going to sea?

A. Yes, two years and nine months.

[fol. 147] Q. Don't you know that a vegetable box is about 4 feet long—4 feet wide, and 8 feet long, and slats 2 inches apart?

A. Yes.

Q. Kept on the upper deck for the purpose of ventilating the vegetables. You didn't see any such box?

A. I saw a box there.

Q. What kind of a box?

A. Just a common, ordinary box.

Q. How big?

A. I don't know the exact dimensions of that box; I didn't measure it.

Q. Did you read over your testimony before the trial?

A. No, I read it yesterday.

Q. Did you make a statement before you made your statement down at Jacksonville?

A. I made a few statements.

Q. Did somebody else write it out for you?

A. Only like—just—somebody took shorthand notes.

Q. Did you ever sign a statement after it was written out?

A. No.

Q. When were you first apprised that you were a witness in this case?

A. I don't remember the exact time; about a year before they took depositions in Jacksonville.

Q. What are you doing now?
A. I am a fisherman.
Q. Fishing out of where?
A. Out on the beach, out of Mayport.
Q. Do you remember this case pretty well?
A. Yes, I remember this case pretty well.
Q. What made you think about it?
A. Well, a man wanted me to come up here to testify and they had taken depositions in Jacksonville.
Q. That all occurred four years after the accident?
A. I don't know; the first man that talked to me about it was a little while after the accident, probably a year or so, [fol. 148] and the next time was when we took the depositions in Jacksonville, and the next was here in New York.
Q. What year was this accident?
A. 1920, but I don't remember the date; that was the only year I was on the "Jacksonville."
Q. Who first talked to you about the case?
A. I don't know the gentleman's name; they were trying to locate me more than anything else.
Q. Did you know this action was not commenced until the 30th day of October, 1923?
A. I didn't know nothing about the action of the case.
Q. Did this man tell you that suit had been commenced?
A. He did not; he wanted to know what I knew about the accident.
Q. Where did he see you?
A. At Mayport, in my home.
Q. Did he have any notes with him?
A. He did, and a lot of questions.
Q. Did he have any papers with him?
A. Not that I remember.
Q. Was that in 1923?
A. I don't remember the year.
Q. Would you contend that it was sooner?
A. I don't know. I don't remember.
Q. What day of the week was the accident on?
A. I don't remember that.
Q. Did you ever go home while you were working on the "Jacksonville"?
A. No, sir, never, till I quit the "Jacksonville."
Q. Did you ever go ashore?
A. Yes, sir.

Q. Did you ever have any friends visit you on the ship?

A. No, sir, not that I remember; she was laying alongside of the "West Compo" in the river.

Q. Was there any current in that river?

A. Not very much.

[fol. 149] Q. Was there any tide in the river?

A. There was very little tide up in that part of the river.

Q. Was there ever any wind in that river?

A. At times there is.

Q. Did this pier extend out into the river?

A. No, sir, it was built parallel with the river.

Q. Still, there was some tide and some current?

A. Very little at that point up the river.

Q. How were these boats secured together?

A. With lines.

Q. Were they port to port or starboard to starboard?

A. I don't remember.

Q. Which way was the "Jacksonville"; up or down stream?

A. I don't remember that.

Q. Which way was the other vessel?

A. I don't remember.

Q. Which vessel was lower in the water?

A. The "Jacksonville."

Q. How much?

A. Approximately 8 or 10 feet or 9 feet; I don't know exactly.

Q. The deck of the "West Compo" to which the planks led was about 8 or 10 feet higher than the deck of the other ship?

A. The saloon deck of the "West Compo" was 8 or 10 feet higher than the boat deck of the "Jacksonville."

Q. That would give a total difference of about 20 feet in the difference between the height of the ship; that is, the height they were in the water?

Objected to.

Q. The saloon deck is below the boat deck of the "West Compo"?

A. Yes.

Q. If the planking ran from the boat deck of the "West Compo" down to the boat deck of the "Jacksonville" the

[fol. 150] distance would have been about 20 feet, would it not?

A. Yes, or close to it.

Q. Did you see any gangplank on either of these vessels?

A. Only the one I was using.

Q. That was not a gangplank, was it?

A. It was a regular gangway running between the two ships.

Q. Did you ever see a gangway on any other ship?

A. Yes, I have seen gangways on other ships.

Q. Describe them.

A. Well, some of them that I have seen were made out of small boards, 4-inch boards running up and down to cleats running across them and a handle on it; and some had lines; they were mostly lines run through holes in the stanchions.

Q. Have you seen a gangway in the regular plan of a ship?

A. Yes; the ones I have seen average about 25 or 22 feet. I have never measured them. They are heavy construction.

Q. Are they used to get on to the dock?

A. Most of them are. They have wheels on one end and if you are loading or unloading a ship, those wheels roll along as the ship goes up or down.

Q. Why are wheels necessary?

A. So that when the ship rises or falls this gangway will not be insecure.

Q. These two ships were together?

A. Yes.

Q. Were they always the same distance apart?

A. There may have been a little variation; not much.

Q. They would vary?

A. Mighty little.

Q. A foot or two?

A. I would not say that; I never noticed.

Q. What was there to keep them close together?

[fol. 151] A. Those lines that tied the two ships together.

Q. Where did those lines run from?

A. They had out spring lines and midship lines.

Q. What deck did they run to?

A. I didn't notice that close.

Q. You know the decks were 8 feet apart, don't you?

A. No.

Q. You know that the butts of the "Jacksonville" were on a deck 8 or 10 feet below the butts on the other boat, don't you?

A. I know what?

Q. Did they have lines from the butts of the "Jacksonville"?

A. They may have had them on the capstan or on butts or anything; I didn't notice that, but I know she was tied there.

Q. She was tied there with lines?

A. Yes.

Q. And the lines run from the deck where the butts were on the "Jacksonville" up through the chocks to the butts on the deck of the "West Compo"?

A. I don't know where they run.

Q. That would give a certain amount of slack line, would it not?

A. I don't know; I didn't notice.

Q. Do you still say that the two boats lay together?

A. I didn't say; I don't know how far they were apart.

Q. Have you talked this case over with your counsel or anybody since you witnessed the accident?

A. No.

Q. Did anybody tell you that you had made a mistake in testifying that those planks were resting on a box?

A. No, sir.

Q. Did it occur to you that if the planks were resting upon a box without any wheels, that the box would be crushed when the ships came together?

[fol. 152] A. It never appeared to me that way.

Q. You never thought about it?

A. Yes, I did.

Q. It is a fact that the end of that plank swung in a line between the end of the boat outside to the smokestack guy; isn't that right?

A. No, sir.

Q. Do you still contend that the end of those planks on the vegetable box of the "Jacksonville" were resting on that box and nothing else?

A. I don't say it was resting on a vegetable box; it was resting on a box.

Q. Didn't counsel ask you about a vegetable box?

A. No, he asked what the gangplank was resting on, and I said a box.

Q. Didn't he ask you if it was on a vegetable box?

A. Not that I remember.

Q. And didn't you say yes?

A. No, sir.

Q. Do you still say that you don't know what a vegetable box is?

A. I don't know.

Q. Describe the box that you saw.

A. It was just a common ordinary box; that is all the explanation that I can give.

Q. How big?

A. I didn't measure it; about 4 feet long; 2, and about 4 feet long.

Q. 2 feet wide and about how high?

A. About 3 feet.

Q. Well, is it 3 feet?

A. I said approximately 3 feet.

Q. Show 3 feet.

A. That is approximately 3 feet (illustrating); that is the height of the box.

Q. Didn't you say you got on to a box 4 feet high?

A. I said I got on to the box.

Q. Didn't you say it was 4 feet high?

A. No.

Q. And didn't you say you didn't remember how you got up on that 4-foot box?

A. I don't remember.

[fol. 153] Q. Do you still say that the ends of the planks were resting on that box?

A. They were, yes.

Q. And the vessels were secured by lines running from the deck on one to the deck of the other?

A. Yes.

Q. And there was a current in the stream?

A. Very little.

Q. And there was a tide in the stream?

A. Very little.

Q. If there was a tide it would go upstream that time?
A. Sometimes it would.
Q. And didn't one of those vessels swing out more than the other sometimes?
A. Not if it had a good tight spring line on.

WILLIAM H. ANDREU, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Cunningham:

Q. Are you from Jacksonville?
A. Yes.
Q. Did you come up here at my request?
A. Yes.
Q. To testify in this case?
A. Yes.
Q. Your testimony was also taken in August when Mr. Floyd's was taken on deposition?
A. Yes.
Q. Were you connected with the crew of the steamship "Jacksonville" on the 1st of August, 1920?
A. I was, as wiper.
Q. That is one of the jobs attached to the engine room?
A. Yes.
[fol. 154] Q. How long had you been a member of the crew?
A. About two weeks.
Q. Did you join the ship there?
A. Yes, at the Municipal office.
Q. Did you see the accident to John Johnson?
A. No, sir.
Q. Did you see him on board the "Jacksonville" that day?
A. Yes.
Q. When did you first see him?
A. I first saw him when he came aboard.
Q. Where did you see him first?
A. I saw him on the deck of the "West Compo."
Q. What did you see him do?

A. I saw him come down the gangway staggering.

Q. That is the gangway extending from the "West Compo" down to the "Jacksonville"?

A. Yes.

Q. About what angle was the gangplank which connected the two ships?

A. About a 15-degree angle.

Q. You saw him first on the "West Compo" and then you saw him on the gangplank itself?

A. Yes.

Q. Had you seen him before?

A. No, sir.

Q. What attracted your attention to him?

A. Well, he was a pretty large sized man.

Q. How did he come down the gangplank?

A. Staggering.

Q. Did he have to assist himself by the hand line which was along one side of the gangplank?

A. Yes.

Q. Where was the line which I have just spoken of?

A. Do you mean the hand line?

Q. Yes.

A. It was tied from the rail of the "West Compo" to the port davit on the "Jacksonville."

[fol. 155] Q. The davit on the "Jacksonville" was on the boat deck?

A. Yes.

Q. And the point where it was tied on the "West Compo" was on the rail?

A. Yes, on the rail on the saloon deck.

Q. How was the gangplank resting on the "West Compo"?

A. It was tied to the deck of the "West Compo."

Q. How?

A. With ropes.

Q. To what?

A. Well, I don't know exactly what it was tied to, but it was tied on each side.

Q. That is, on the "West Compo's" side; where did the "West Compo" end of the gangplank rest?

A. On the deck.

Q. Was there a rail or railing above the gangplank on the "West Compo"?

A. There was a movable rail, the same as if you could take the rail right out.

Q. Had that movable portion been removed?

Objected to.

Objection overruled.

A. Yes.

Q. You say there was a movable section of the rail where the gangplank rested, on the "West Compo"?

A. Yes.

Q. Was that movable section left there, or was it taken out?

A. It was taken out.

Objected to.

The Court: He said it was taken out.

Q. Did you use the gangplank yourself?

A. I did.

Q. How was it fixed, as far as steadiness or swinging [fol. 156] was concerned?

A. It was lashed to the deck of the "West Compo" and resting on a box on the "Jacksonville" end.

Q. And the box was on the boat deck of the "Jacksonville"?

A. Yes.

Q. What were the dimensions of the box on which the "Jacksonville" end rested?

A. Well, I should say approximately about 2½ or 3 feet high.

Q. About how long and how wide?

A. I don't remember that.

Q. Your recollection is that the box itself sat how far above the "Jacksonville" deck?

A. About 2½ or 3 feet.

Q. Have you a distinct recollection of where the "Jacksonville" end of the plank rested? Did it rest on the box or was it suspended in the air?

A. It rested on the box.

Q. What was the nature of the boat deck of the "Jacksonville"? What was the boat deck of the "Jacksonville" covered with?

A. Canvas.

Q. Canvas over what?

A. On the deck, on the top of the deck.

Q. Do you know what was under the canvas?

A. Wood, I imagine.

Q. You don't know whether it was wood, but that is your best answer?

A. Yes.

Q. But you are sure that the deck itself was covered with canvas?

A. Yes.

Q. When Johnson came on board this ship you saw him first on the "West Compo"?

A. Yes.

Q. And then you saw him come down the deck?

A. Yes.

Q. Was he alone or was he accompanied by somebody [fol. 157] when he came on board?

A. He was by himself.

Q. Did you see the boatswain Carlson there at that time?

A. No.

Q. Do you know who he was?

A. I just knew him by the name of Carlson; that was all.

Q. That is, you knew the boatswain of the "Jacksonville" and knew that his name was Carlson?

A. Yes.

Q. You say Carlson was not present when Johnson came on board?

A. I never saw him.

Q. Where did Johnson go after he arrived on the "Jacksonville"?

A. He came down to the saloon deck by a ladder from the other side, down to the saloon deck, and where he went after that, I don't know.

Q. When he landed on the boat deck he went down a ladder to the next deck below?

A. Yes, the saloon deck.

Q. Is that also called the well deck?

A. No, sir.

Q. You have to go down still another deck to get to the well deck?

A. Yes, sir.

Q. You don't know what became of him?

A. No, sir.

Q. Did you see Johnson again that day?
A. Not until after he was in the water.
Q. When did you see him again?
A. About dusk.
Q. About what time of day did Johnson come on board the steamship "Jacksonville"?
A. Around 5 o'clock.
Q. Were the men at work at that time?
A. I don't remember whether that was just knocking off time or just before knocking off time.
Q. Had you men had mess yet that day?
A. No, sir.
[fol. 158] Q. What time did you have mess aboard the "Jacksonville"?
A. At 5:30.
Q. What time did you next see Johnson?
A. About dusk.
Q. Can you tell us in terms of hours of the day about what time dusk was then?
A. I should say about 7 o'clock.
Q. What attracted your attention to Johnson?
A. Someone said a man overboard, and I went up to where it was.
Q. Tell the Court and jury what you saw.
A. A fellow by the name of Sonstehy went down the ladder, over the side, and went down to him.
Q. Did you look over the side of the vessel?
A. Yes.
Q. Where was Johnson then?
A. Down in the water.
Q. How far apart were the two ships at that time?
—. At the top or bottom?
Q. At the bottom.
A. Not more than 2 feet.
Q. How far apart were they at the top?
A. About 3 or 4 feet.
Q. When you looked down you saw Johnson in the water?
A. Yes.
Q. What did Sonstehy do?
A. He put a ladder over the side and went down to Mr. Johnson.
Q. Did he go down alone?

A. He went down alone, and just after he went down a fellow came from the "West Compo" down the gangway and went down with Mr. Sonstehy.

Q. Do you know who that was?

A. I do not.

Q. Would you recognize his name?

A. No, sir.

Q. What did you see?

A. They pulled him up on the deck.

Q. When they brought him up which ship did they bring him on to?

A. On the "Jacksonville."

[fol. 159] Q. How near to you did they put him on the deck?

A. About 2 or 3 feet from me.

Q. Was he conscious or unconscious?

A. He acted unconscious.

Q. Did you notice anything about him at the time?

A. He smelled of liquor, yes.

Q. You smelled that yourself?

A. Yes.

Q. You said he staggered down the gangplank when he came on board?

A. Yes.

Q. And the next time was when he was finally pulled on board?

A. Yes.

Q. Who was the carpenter of the ship at that time?

A. Mr. Stuart.

Q. Was he the carpenter when you joined the ship?

A. Yes.

Q. Did you make the voyage which the "Jacksonville" took two or three weeks after this accident?

A. Yes.

Q. Was Stuart the name of the carpenter then?

A. He wasn't the carpenter then; he was the boatswain.

Q. But he was carpenter when the accident took place?

A. Yes.

Q. Did he make the trip as boatswain subsequently?

A. Yes.

Q. Who was the boatswain at that time?

A. Carlson.

Q. Do you know what became of him?

A. No, sir.

Q. He didn't make the next trip with the ship?

A. No, sir.

Q. Was there repair work going on on the ship at that time?

A. Yes, on deck and in the engine room.

Q. Where was your work then?

A. In the engine room.

[fol. 160] Q. Were you there when the repair men were working on the engine room?

A. Yes; they were working on the steering engine.

Q. How many men were in that gang?

A. Say about 40.

Q. Do you know whether there were other men working up on the decks, repairing the winches?

A. Yes.

Q. Did you see them from time to time?

A. Yes.

Q. Did you see any of them use this gangway yourself?

A. Every day I did, yes.

Q. I think you said it was resting squarely upon this box?

A. Yes.

Q. These men all came from the bow right across the "West Compo" down the gangplank and on to the "Jacksonville"?

A. Yes.

Q. How many members of the crew were there?

A. Around 40.

Q. Do you know whether or not there were any members of the crew missing or lacking at that time?

A. Not as I know of.

Q. Was the carpenter on board the ship there?

A. Very near every day I saw him, yes.

Q. Did you mess in the mess room with him?

A. No, sir.

Q. Was there any time when the carpenter was absent from the ship for three days at a time?

A. Not to my knowledge.

Q. Will you look at this model which Mr. Johnson says represents the way this gangplank was rigged from the

"West Compo" to the "Jacksonville"? Do you notice that he has it hung up in the air with a guy or rope attached to another rope which comes from what is apparently a smokestack?

A. Yes.

[fol. 161] Q. It holds it in the air above a square which has been marked in pencil. Mr. Johnson states that that end of the gangplank was swinging free in the air in that way. Is that the way it was rigged on the "Jacksonville"?

A. No, sir.

Q. Did this lower or "Jacksonville" end of the gangplank swing free in the air or rest solidly on something?

A. It rested solidly on a box.

Q. Mr. Johnson states that when he fell in ascending the gangplank he caught his arm around a stanchion. Will you tell us whether or not that gangplank was rigged with any stanchion at all?

A. None, as I know of.

Q. Do you mean that you are in doubt whether there was a stanchion there?

A. No, sir, there was none that I saw.

Q. Well, was there any there?

A. No, sir.

Q. So that your testimony is, or is your testimony, that this heaving line extended from the rail on the "West Compo" straight down to a boat davit?

A. Yes.

Q. And that there was nothing by way of a stanchion in the entire length of that rail?

A. No, sir.

Q. When you went up the gangplank from the "Jacksonville"—in other words, when ascending the gangplank—which side of you was the hand line on?

A. I don't remember.

By the Court:

Q. Immediately after Mr. Johnson fell did you see the gangplank?

A. I did.

Q. Was its position changed or was it in the same position that it was in before?

A. It was in the same position.

[fol. 162] Q. Was the hand line there?
A. Yes.
Q. Had the hand line been broken?
A. No, sir.

Cross-examined by Mr. Axtell:

Q. You are the Mr. Andren that testified down at Jacksonville, aren't you?
A. Yes.
Q. Do you remember what you testified to there?
A. Yes.
Q. Were you under oath?
A. I was.
Q. Did you swear to tell the truth at that time?
A. I did.
Q. Did you tell the truth?
A. I did.
Q. Did you make this answer on page 59:

"Q. Do you know whether the end of the gangplank was lashed to any part of the ship on the 'Jacksonville,' or just resting on a box?"

Did you make this answer:

"A. I don't know; it was on a box, was all I know."

Q. Did you make that answer?
A. I don't remember.
Q. Do you deny that you made that answer?
A. Well, no.
Q. Did you answer this question:

"Q. Was there any stanchion or hand rail on this gangplank?"

Q. Do you remember such a question being asked you?
A. Yes.
Q. Did you make the answer "Yes"? I will let you look at this deposition and read it over before you answer the question.
A. Not to my knowledge.
Q. Will you turn back to the beginning and read over all your testimony and tell us if there are any errors?

[fol. 163] Objected to.
Objection sustained.

Q. Then there was a question repeated to you:

"Q. There was a stanchion on it?
"A. Yes."

A. That book has got it that way.
Q. Then was this question asked:

"Q. Do you know what the stanchion was made out of?
"A. Made of an iron pipe."

Q. Did you answer that so?
A. I don't remember.
Q. (Reading:)

"Q. Was that made fast to the gangway?
"A. Yes."

A. Was it made fast to the gangway?
Q. Was the stanchion made fast to the gangway?
A. I don't remember.
Q. (Reading:)

"Q. Do you know whether or not there was a line made fast to that stanchion?
"A. Yes."

Did you make that answer?
A. I don't remember.
Q. You don't deny it, do you?
A. I said I don't remember.
Q. Which is correct? The testimony there or the testimony you have sworn to here?
A. The only thing I am going by is my basis of knowledge.
Q. On what is your basis of knowledge based? What is your knowledge?
A. My knowledge is of the gangplank.
Q. From what basis?
A. The basis of my best remembrance.
Q. What is your remembrance based upon?
A. I don't remember any stanchion being on the gangway at all.

Q. But you did so swear under oath in your deposition [fol. 164] in 1926, didn't you?

A. I don't remember.

Q. When did you read this deposition over?

A. I don't know.

Mr. Axtell: I offer in evidence page 59 of the deposition.

Mr. Cunningham: Tear it out if you want to.

(The page is marked Plaintiff's Exhibit 12.)

Q. Did you testify down there at that time that it was dark at the time Johnson was found in the water between the two boats?

A. I don't remember whether it was dark or dusk.

Q. I am asking you what you swore to last year. I don't ask you to remember. You don't remember what you swore to last year; is that it?

The Court: Ask him the question, Mr. Axtell.

Q. Did you see the ambulance doctor come there?

A. I did not.

Q. Did you know that an ambulance did come?

A. Only by hearsay.

Q. It came right away, just as soon as possible?

A. I expect so; I don't know.

Q. Did you see the doctor in his white suit?

A. No.

Q. Did you see him come down and help get this man into the ambulance?

A. I did not.

Q. Did you testify to this on cross examination (page 56):

[fol. 165] "Q. Were you on watch?

"A. No. sir.

"Q. You were one of the day gang?

"A. Yes.

"Q. Do you remember whether or not you were working that day?

"A. I was working that day."

Did you so testify?

A. Yes.

Q. Did you say this:

"Q. What time of day was it you saw Mr. Johnson in the water between these two ships?"

Were you asked that question?

A. Yes.

Q. (Reading:)

"A. It was night."

Did you make that answer?

A. I don't remember whether I made that answer or not.

Q. (Reading:)

"Was it light or dark?

"A. Dark."

Is that correct? Did you so testify?

A. I don't remember whether I said it was dark or dusk.

Q. Well, which was it?

A. It was between dark and dusk, just making good dark.

Q. Do you live in Jacksonville?

A. No, in Mayport.

Q. Did you ever go off the ship?

A. I did.

Q. Were you on watch as a wiper while the vessel was in port?

A. On watch working, to work in the engine room, yes.

Q. On Sundays?

A. On Sundays.

Q. Do you mean to say that in your home port and your home town you were working on Sundays on watch as a wiper?

A. I was.

Q. What were you doing?

A. I was doing as the first assistant told me to do.

Q. What did you do the first of August?

A. Repair work.

Q. You know that was Sunday, don't you?

A. Yes.

Q. You swear you were working on Sunday?

A. I do.

[fol. 166] Q. Were the rest of the crew working?

A. Yes.

Q. Did you go to sea on the ship?

A. I did.

Q. When you went to sea on the ship did you have regular watches?

A. Only the day watch; working day times.

Q. Aren't your watches different in port than at sea?

A. A wiper is not; they work all the time.

Q. And in that time they work on Sunday in Jacksonville?

A. Yes.

Q. What did you receive?

A. I don't remember.

Mr. Axtell: I offer in evidence page 56 of the deposition.

(It is marked Plaintiff's Exhibit 13.)

Redirect examination.

By Mr. Cunningham:

Q. Do you remember whether there were some lights rigged on the "Jacksonville" end of the gangplank?

Objected to as leading.

A. Yes.

Q. Do you remember whether there were any means provided on the "West Compo" at that end of the plank for illumination?

A. Yes, there was a big cluster light over the top of the gangway that shone down on the gangway.

Q. Do you remember whether or not, at the time Johnson fell into the water, those lights were burning?

A. Yes, sir, they were burning.

Q. Do you remember whether or not there was anything unusual going on on board the "West Compo" that night?

[fol. 167] A. There was a party of some kind.

Q. Do you remember what the condition of the decks of the "West Compo" was in the matter of illumination?

A. They were all lit up.

Q. Did you ever hear what the party was that was going on on board the "West Compo"?

A. There was a kind of a marriage supper, I think, a wedding.

Recross-examination.

By Mr. Axtell:

Q. You haid there was a box under the end of the planks?
A. On the "Jacksonville."
Q. Which way was the long way of the box running?
A. I don't remember.
Q. Was it a box with slats in it?
A. I don't remember whether it had slats in it or not.
Q. Was it a vegetable box?
A. I don't know.
Q. Have you read the testimony of the carpenter that it was a vegetable box 4 feet high and 4 feet wide and 8 feet long?
A. I don't remember what he testified.
Q. Did you hear him testify in Jacksonville?
A. No.
Q. You testified and the man was sitting right in the room?
A. Yes.
Q. And he went down there to hear you?
A. He did.

Archie Stuart, being duly sworn and examined as a witness for the defendant, testifies:

By Mr. Cunningham:

Q. Were you a member of the crew of the steamship "Jacksonville" on August 1, 1920?
A. Yes.
Q. What was your job?
A. Carpenter.
[fol. 168] Q. When did you join the steamship "Jacksonville"?
A. Six months previous to that.
Q. Had you made a voyage or more in her?
A. Yes, one voyage.
Q. Did you make the voyage succeeding the period August 1, 1920?
A. Yes.

Q. Did you sail as carpenter or something else on that voyage?

A. I sailed as boatswain.

Q. Whose place did you take as boatswain on the voyage which followed August 1, 1920?

A. A. Carlson's place.

Q. Had he been boatswain on the previous voyage?

A. Yes.

Q. Your home is where?

A. In Jacksonville, Florida.

Q. Have you come up here at my request on telegraphic summons to testify in this case?

A. Yes.

Q. Did you testify in this case on the 4th of August, 1926, at Jacksonville, at the office of the United States Attorney?

A. Yes.

Q. Was Mr. Johnson present when you were testifying at that time?

A. Yes.

Q. Do you remember an accident happening on the "Jacksonville" on August 1, 1920?

A. Yes.

Q. Did you see the accident, personally?

A. No, sir.

Q. So that all you know about how it happened is what somebody else told you?

A. From hearsay.

Q. Did you see Mr. Johnson on August 1, 1920?

A. That was that day.

Q. Yes.

A. Yes.

Q. Where did you see Mr. Johnson the first time that day?

A. On the forward well deck.

[fol. 169] Q. Did you see Mr. Carlson on the ship that afternoon just before you saw Mr. Johnson?

A. Yes.

Q. Where did you see Mr. Carlson on that afternoon just before you saw Mr. Johnson?

A. I saw him up in the forecastle.

Q. Did you hear anything said about Mr. Johnson by him at the time, or didn't you?

A. We were all there in the forecastle and somebody came and said Mr. Johnson wanted to see Mr. Carlson and he said, "Tell him to come on board."

Q. That was in the forecastle?

A. Yes.

Q. And Carlson was in the forecastle when that was said?

A. Well, he was in the forecastle or around the forecastle. It is 7 years ago, you know.

Q. Did you see Mr. Johnson on board the ship shortly after that?

A. I did.

Q. When you heard that was Mr. Johnson on the ship at the time, so far as you know?

A. When I heard what?

Q. When you heard that Johnson wanted to come on board?

A. I don't know if he was ashore or on board, but I just overheard the conversation.

Q. Did you know Johnson at that time, personally?

A. No, sir.

Q. Had you ever met him either then or any time prior?

A. Not to my knowledge.

Q. When did you first see Johnson on board the ship?

A. I first saw Johnson on board the ship that day of the accident on the forward well deck. I was coming from aft when the boatswain called to me and said, "Come and meet Johnson," and I went over and shook hands with him and kept on going. I was busy at that time.

[fol. 170] Q. When Carlson called you to come over and meet Johnson, was that before or after what you have told us you heard in the forecastle?

A. That was after.

Q. After you heard that you had gone where?

A. I went aft.

Q. When you came back from what you were doing, then Johnson was on board the ship?

A. Yes, sir.

Q. At that time the boatswain, Carlson, called you over to meet him?

A. Yes.

Q. Did you notice anything about Mr. Johnson's condition at that time?

A. He was feeling pretty good.

Q. Did you notice anything? Could you detect whether or not he had been drinking?

A. Yes, I noticed in his actions that he was not acting like a sober man would; you could smell liquor too.

Q. After you shook hands with him, where did you say you went?

A. I went around forward.

Q. Do you know where Johnson then went?

A. I am not positive, but I think he went to the boatswain's room.

Q. Did you and the boatswain share the same room on board the ship?

A. Yes.

Q. That is the custom, is it not?

A. That is the custom.

Q. The boatswain and the carpenter share the same room?

A. Yes.

Q. What time of day was it that you shook hands with Johnson, as described?

A. I think around about 5 o'clock.

Q. Had you knocked off work for the day?

A. We were just finishing up for the day.

Q. That was Sunday?

A. Yes.

[fol. 171] Q. Had the crew been at work that day?

A. I can't recollect about the crew, but I know I was working all day.

Q. Was the repair work going on, was the repair gang on the work on the winches and the engine room?

A. Yes.

Q. Was that a rush job?

A. That was a rush job.

Q. And that was why they were working on it, putting in day work that Sunday?

A. Yes.

Q. What time of day did you see Johnson on board the ship first?

A. Well, around about 5 o'clock it was when I first saw Johnson.

Q. What time did you other men have your mess on the "Jacksonville"?

A. Around 5:30.

Q. Did you have your supper on board the ship that night?

A. Yes.

Q. Was it before or after you first saw Johnson on the ship?

A. After.

Q. Before you had your supper you knocked off work?

A. Yes.

Q. After you knocked off work where did you go then?

A. I went to my room.

Q. What for?

A. I think it was for a towel to clean up, and when I went in the room the boatswain and Johnson were sitting in the room with the door closed.

Q. When you opened the door they were inside?

A. Yes.

Q. Did you notice anything in there at that time?

A. No, sir.

Q. Did you get your towel?

A. Yes.

Q. What did you do then?

A. I went to the bath room and washed up and went back to the mess.

[fol. 172] Q. After you were washed up did you return your towel to your room?

A. No, I left it there and then I went to the mess room.

Q. After you finished your supper, where did you go then?

A. I went back up forward.

Q. Did you go to your room?

A. Not straight; I went up there and was standing speaking to someone when the boatswain and Mr. Johnson came out of the room hand in hand, and they wandered down the deck and I went into the room and changed my clothes to get ready to go ashore.

Q. When you stood there Johnson and Carlson came out of the room together?

A. Yes.

Q. Was the door open or closed at that time?

A. The door was closed till they opened it.

Q. They walked down hand in hand or arm in arm?

A. Arm in arm; they were leaning on each other. I went in the room and there was an odor of liquor. Then I changed my clothes and got ashore.

Q. Did you see Johnson again then?

A. No, sir.

Q. Did you ever see him again?

A. Yes, I met him again at Jacksonville.

Q. When was that?

A. At the time we gave our testimony.

Q. August 4, 1926?

A. Yes, August 4, 1926.

Q. About 6 years later?

A. Yes.

Q. He has testified that he met you in Jacksonville some three weeks or so before the accident. Did you hear him so testify?

A. Yes.

Q. Did you ever meet him in Jacksonville or see him before you saw him on the deck of that ship?

A. No, sir, not to my knowledge.

Q. You testified that you were the ship's carpenter?

A. Yes.

[fol. 173] Q. Did you absent yourself from your ship for three days prior to the accident which happened to Johnson?

A. No, sir.

Q. Were you off the ship at any time when it was lying outside of the "West Compo" during the day time?

A. Only on shore doing business.

Q. Were you off duty at any time?

A. No, I was on duty.

Q. Did you do your regular shift of duties each day during the time she lay outside of the "West Compo"?

A. Yes.

Q. Did you ever hear it said on board the ship that they needed another carpenter in your place?

A. No, sir.

Q. You were the ship's carpenter?

A. Yes.

Q. Did you hear Mr. Johnson testify that Carlson went up into Jacksonville to look for a man to take the place of the carpenter who had been absent three days?

A. I did.

Q. You were the only ship's carpenter on the "Jacksonville?

A. Yes, sir.

Q. Had you been absent three days?

A. No, sir.

Q. Did you know that Carlson was looking for somebody to take your place?

A. No, sir.

Q. Do you recollect the gangplank which connected the "Jacksonville" with the "West Compo"?

A. I do.

Q. Do you recollect it particularly?

A. Yes, sir, because I made it.

Q. Will you tell the Court and jury just what you did in making this gangplank?

A. I got three 10 x 2½ rough planks 12 feet long, and I nailed cleats across them, 2 inches broad, and about an inch thick.

[fol. 174] Q. How far apart were the cleats nailed on to the planks?

A. About 15 to 18 inches.

Q. What did those cleats serve for?

A. A foothold.

Q. Did they also serve to hold the planks together?

A. Yes, sir.

Q. You did that work yourself?

A. Yes.

Q. Who ordered you to do it?

A. The chief officer.

Q. Did you take your orders directly from him or from the boatswain?

A. The boatswain had nothing to do with me. I got my orders from the chief officer.

Q. Who was the chief officer at that time?

A. Mr. Irwin.

Q. Was he the chief officer on the night that Johnson met with his accident?

A. No, sir.

Q. Had he been succeeded by somebody else?

A. John K. Littlefield.

Q. How long before the accident was he succeeded by Littlefield?

A. I don't recollect.

Q. You are sure that the change had taken place?

A. Yes, sir.

Q. And the previous chief officer had directed you to erect this gangplank?

A. Yes.

Q. After you had constructed the gangplank did you put it up between the two ships?

A. Yes, sir, along with several sailors.

Q. How did you attach it to the "West Compo"?

A. We had two lines on the end of the gangway and on the "West Compo" end, one at each end, and it was lashed to a cleat on the deck of the "West Compo" and on the stanchion on the other side, down on the "West Compo."

Q. At the top of the gangplank on the "West Compo" side it was lashed on both sides to a stanchion or to a [fol. 175] cleat?

A. One to a cleat and the other to a stanchion.

Q. Where did the "Jacksonville" end of the gangplank rest?

A. On the boat deck.

Q. Did it rest right on the boat deck?

A. I can't very well remember what it rested on, but it didn't rest on the deck as it was a canvas deck and it would have torn the deck up, so it was lying on something, but I can't recollect what it was.

Q. Do you recollect whether it rested on something securely or whether it was suspended in the air?

A. It rested on something securely, because that end on the "Jacksonville" was not made fast at all.

Q. Was the "Jacksonville" end of the gangplank suspended in the air?

A. I can't recollect what it was suspended on.

Q. You have heard the testimony that it rested on a box?

A. Yes.

Q. Have you any recollection about it?

A. Well, I think it did rest on a box, but what kind of box, I can't figure out.

Q. I show you a diagram which has been used by Mr. Johnson to show the Court and jury how the gangplank rested on the "Jacksonville" or was secured there, and I will ask you whether that is the way in which the gangplank was secured on the "Jacksonville" end of the gangplank?

A. No, sir.

Q. You observe from this model that what would be the "Jacksonville" end of the gangplank is hung by a sort of loop around the lower end of it with a rope running up to a guy running from the smokestack, so that it hung freely some inches above the deck of the ship?

A. Yes.

[fol. 176] Q. Is that the way the gangplank was erceted?

A. No, no sane seaman would rig a gangway like that.

Q. Did you use it yourself?

A. Yes.

Q. Frequently?

A. Yes, sir.

Q. When you went up it was a firm gangplank with firm footing, or did it swing in the air?

A. It had a firm footing.

Q. Did you see other men using it?

A. Yes.

Q. How many men were working on the engines of the vessel?

A. I would figure around 40 or 50 men.

Q. How many members of the crew were there?

A. Around 40.

Q. So that you all used it frequently?

A. Yes.

Q. Did you ever hear of any accident happening to anybody but Mr. Johnson on this gangplank?

Objected to as hearsay.

A. No, sir, I never heard of anyone going up or down that gangplank and meeting with an accident; I never heard any complaint about the gangplank.

Q. Where was the heaving line that was used as a hand rail erected on the gangplank?

A. It was erected on the rail, the top guard rail on the "West Compo."

Q. On the "West Compo" end there was what?

A. There was a guard rail there.

Q. One end was tied to the guard rail there?

A. Yes.

Q. Where was the end on the "Jacksonville" erected?

A. It was made fast to the boat davit.

Q. Was there any stanchion on that gangplank through which this hand or heaving line ran?

A. No, sir.

[fol. 177] Q. In order to put a stanchion there what would you have to do?

A. I would have to get a stanchion made with two holes and pull it through the plank.

Q. Will you show what you mean by that? Will you show it to the jury?

A. I would have to have a stanchion made with a socket and hole on each side of it to put the two bolts through to a fish plate at the bottom.

Q. When you had arranged that in the gangplank the stanchion would sit down in the socket?

A. Yes.

Q. How would it then be held upright?

A. The two bolts would hold it upright.

Q. Would such stanchion have eyes at the top through which you could reeve a line?

A. Yes.

Q. You made that gangplank yourself?

A. Yes.

Q. Was there any such stanchion there?

A. No, sir.

Q. On which side of the gangplank was the heaving line that was used for a hand rail, having in mind that you are coming down the gangplank from the "West Compo" to the "Jacksonville"?

A. I made a wrong statement in my statement in Jacksonville. After I saw the plans of the ship I realized my mistake. I said it was the opposite way from which it is; it was the right-hand side going up, and the left-hand side coming down.

Q. The right-hand side going up and the left-hand side coming down?

A. Yes, the left-hand side coming down.

Q. So that if Mr. Johnson went up that gangplank the hand line was on his right?

A. On his right-hand side.

[fol. 178] Q. Do you remember what arrangements were made on the "West Compo" in the matter of lighting the gangplank?

A. No, I don't know.

Q. Were there any arrangements made?

A. Not to my knowledge.

Q. Were there any lights on the "Jacksonville" end of the gangplank?

A. Yes, there was a cluster light.

Q. How many lights to a cluster were there?

A. From 5 to 7.

Q. About what candlepower?

A. Just the ordinary ship's candlepower; I don't know what it was.

Q. They wer electric lights?

A. Yes.

Q. And their power came from the ship's dynamo?

A. Yes.

Q. Between the 1st of August, 1920, and the 4th of August, 1926, a period of six years, you never saw Johnson at all?

A. No, sir.

Q. And the second time that you ever saw him was in the office of the United States Attorney in Jacksonville, when your deposition was taken in this case?

A. Yes.

Q. Johnson was present, wasn't he?

A. Yes.

Q. After your deposition had been taken did you have a conversation with Mr. Johnson out in the corridor of the Government Building there where the testimony was taken?

A. I did, sir.

Q. Will you tell the Court and the jury what conversation you had with Mr. Johnson after you had finished giving your testimony before the Commissioner down there?

A. We were walking out of the court room door and Mr. Johnson was walking alongside of me and I said, "I am sorry for you, but I have told nothing but the truth." And he said, "I know, but I was sober when I came on board, and got it all on board."

[fol. 179] Cross-examined by Mr. Axtell:

Q. Isn't it true that Mr. Johnson remonstrated with you for telling what he called a lot of lies and you said, "I told nothing but the truth, Mr. Johnson"?

A. That was what I said.

Q. And then didn't you say, "It is too bad you didn't see me before"?

A. No, sir.

Q. Didn't you say that?

A. No, sir.

Q. Did the ship have a regular gangway?

A. An accommodation ladder.

Q. Did she have a gangway with wheels on it?

A. No, sir.

Q. If you had had such a gangway would you have used it in this place?

Objected to as calling for a conclusion.

The Court: He may answer.

A. It all depends on the length of the gangway we would have had.

Q. A ship of that size would carry a gangway 20 feet long.

A. Ships of that size don't usually carry an ordinary gangway.

Q. You have seen them?

A. I have seen them and made them.

Q. You have seen them with wheels on them provided in a regular equipment on such ships?

A. Yes.

Q. If you had had such a gangway on that ship would you have used it?

A. No, sir.

Q. Why would you not ever put the top up and tie it to the stanchion in the cleat and let the wheels rest on the canvas deck below, so that these ropes would swing in and out and there would be no tearing of the canvas?

A. You couldn't, because there would be too much of a [fol. 180] slope. The boat had not so much room there in front, there was the accommodation or wireless, and some other party, I think the deck engineer, lived up there in the wireless room, and there would be no room.

Q. There is another thing: Did this thing have an opening in the deck for the rail of the "West Compo" at this point?

A. Yes.

Q. There was a stanchion on either side, then?

A. There was a stanchion on either side.

Q. How far apart were those stanchions?

A. I think around 3 feet.

Q. That was a removable rail that went in there?

A. Yes.

Q. Was it one piece of rail that dropped in or was it pieces of pipe that slid into each other?

A. Well, they are all made in one way, with three pieces of iron; not solid iron, and the ends are turned down, that it drops into. There were four drops(?), two in the top and one in the bottom.

Q. Were they separated or all one piece?

A. They were all one piece, of course.

Q. Were there two of those pieces of pipe?

A. There were three pieces, I think, in height.

Q. It had three pipes in it?

A. Three pipes in it.

Q. A three-pipe rail?

A. Yes.

Q. You think so?

A. I am mostly positive; it was either 3 or 4.

Q. Were they all the same size?

A. No, the top was a 2-inch pipe and the other was an inch.

Q. Did you put them all in at once?

A. Yes.

Q. You said she had 3 or 4 rails?

A. Yes, but she had only four ends, the top and the bottom.

[fol. 181] Q. If you had two stanchions there 3 feet apart and you had three planks of your gangplank 12 inches wide, which fitted in between them, why didn't you tie your lashing to your two stanchions evenly on each side instead of laying one over on a cleat?

A. I said the planks were 10 inches wide. We didn't do that because it is a better hold on the cleat than it is around a stanchion.

Q. At the end of the rail of the ship where you go down the gangway, was there a little steel gunwale at the side of the ship?

A. It came up above the deck level; they have got a gunwale about 2½ inches.

Q. It is a little higher than that?

A. Sometimes.

Q. Sometimes they are 4 or 5 or 6 inches high?

A. No, sir; some are 4 inches, but I never saw one 6 inches.

Q. You never saw one 2 inches, did you?

A. Yes, a 2½ angle iron I have seen.

Q. And you have got the steel plating of your ship——

A. Yes.

Q. Inside of that you have got another plate equally thick?

A. You have got an angle iron inside, and they are riveted together; they might be ⅞ or ¾ thick.

Q. Not less than ⅝?

A. No.

Q. Do you say you had an angle iron inside of that as thick as that and only 2 inches high?

A. I say 2½.

Q. The average is about 4½ to 5 inches?

A. Not in all gunwales.

Q. Do you remember this gunwale particularly?

A. No, not particularly.

Q. You have heard a lawyer here say that that thing was not so high as 6 inches, haven't you?

A. I never paid no attention; I didn't care.

[fol. 182] Q. You heard Mr. Johnson testify that the plank was resting on top of the rail, really the gunwale?

A. The gunwale, yes; it is not a rail. The side of the ship is never called a rail.

Q. You knew what they were talking about?

A. How did I know?

Q. Didn't you?

A. I am a shipbuilder by trade, and I think I know a little about ships.

Q. You knew what was meant, didn't you?

A. No, sir.

Q. What day of the week was it?

A. Sunday.

Q. How do you know it was Sunday?

A. Well, only hearsay; for I forgot distinctly what day it was.

Q. When did you first know it was Sunday?

A. The last testimony in Jacksonville.

Q. I read you a question from page 24——

A. That was after I gave the testimony; then I knew it was Sunday.

Q. (Reading:) "Q. You don't remember whether it was Sunday, Monday or Tuesday?

A. I don't remember what day it was." A. That is correct, sir.

Q. Who told you afterwards?

A. I think Mr. Dreyer.

Q. Who was he?

A. That was a lawyer for the Shipping Board.

Q. What else did he tell you?

A. I can't recollect.

Q. Did you talk to him before you testified down there?

A. Yes, sir.

Q. Did you tell him down there that there was no stanchion on the side of this plank?

A. I don't think they asked me; I am not sure.

Q. You know there was, don't you?

A. There was no stanchion there.

[fol. 183] Q. Didn't you so testify down there?

A. No, sir.

Q. Did you see Mr. Johnson take any liquor?

A. No, sir.

Q. Did you see Mr. Carlson take any liquor?

A. Many a time, sir.

Q. Did you take any?

A. No, sir.

Q. You roomed with him, did you?

A. Yes, I roomed with him.

Q. Where did you see him take the liquor?

A. In the room.

Q. You never had a drink with him?

A. No; he was drinking 190 per cent whiskey, and I am not crazy enough to do that.

Q. What is 190?

A. That is whiskey just come out of the still and it was getting imported to Belgium, and several of the crew had

gotten down into the hold and had filled cans with it and got water and weakened it down.

Q. They were importing whiskey?

A. They were importing whiskey from America to Belgium.

Q. On this ship?

A. On this ship.

Q. Where were you born?

A. In Belfast, Ireland.

Q. Did you ever work in a distillery?

A. No, sir.

Q. Where did you get your information about whiskey 190 per cent?

A. That was the information that was going around the ship. I know it was hard enough. I have seen them throw a match at it and it would go up.

Q. You never had drunk it?

A. No, I have had none of that.

Q. You didn't even taste it?

A. No, sir, I was scared of it.

[fol. 184] Q. Did you ever see any other whiskey that was worse?

A. Yes, sir.

Q. Did you ever see any whiskey that was not worse?

A. Yes.

Q. Did you ever see any good liquor that was not worse?

A. No, sir.

Q. Then this was good liquor?

A. It was too strong; you take any ordinary liquor and a match would make it go like that (snapping his fingers); that went off like gunpowder.

Q. Have you had a drink since then?

A. I have had many a drink.

The Court: You are not bound to answer in a way that will incriminate or degrade yourself.

Q. Were you asked this question on page 17:

"Q. And then used the stanchion and the hand line and rigged up this accommodation ladder in that manner?

"A. Yes, sir, that was the way we did it."

A. That was referring to making a gangway.

Q. This was a substitute for the ——

A. Yes, a fool-rigged gangway.
Q. What do you mean by "fool-rigged"?
A. It was a makeshift.
Q. When you refer to a jury rigged anchor, what do you mean by that?
A. It is an anchor that is made jury rigged when it is over the stern end of the ship.
Q. How is it fastened to the ship?
A. By bitts by a line, wire.
Q. Lines running where?

The Court: What are you doing with anchors?
Mr. Axtell: You will see in just a moment.

[fol. 185] Q. You had lines running to something that is drifting aft, a kind of a big thing?
A. Yes; that is when a rudder breaks down.
Q. What you mean by jury rigged here is that you had rigged up two planks with two lines in jury rig hanging over?
A. No, I meant that it was a makeshift; it was not a permanent part of the ship. That is why I called it a jury rig.
Q. You called it a jury rig because it resembled the only jury rig you ever heard of?
A. No; that is not so.
Q. What was it?
A. A swinging rig is a jury rig.
Q. How are they made?

Mr. Cunningham: Objected to.
The Court: This is not a class in seamanship. It is not part of the issue. We are dealing with this gangway.

Q. Well, taking this gangway with the planks on it, you had a line rigged either side of it and it was hanging in the middle so as not to scrape the canvas deck, with a box to step up on it?
A. I would not call it any rig at all. That would be a fool's rig.

Mr. Cunningham: I offer in evidence the certificate of registry of the steamship "Jacksonville."
(It is marked Defendant's Exhibit A.)

Defendant rests.

[fol. 186] TESTIMONY IN REBUTTAL

JOHN JOHNSON, recalled, testifies in rebuttal:

By Mr. Axtell:

Q. You heard the testimony of Mr. Stuart and some of these other men; they said you appeared to have been drinking on the day of the accident?

A. Yes, I heard them say that.

Q. Had you had anything of an intoxicating nature to drink that day?

A. No, sir.

Q. Did the boatswain take any liquor, that you know of, that day?

A. I seen none. We had nothing when we went on board.

Q. Do you know what the regulations of the Shipping Board boats were at that time with regard to having liquor on board?

A. No, I do not.

Q. Did you hear the testimony of Mr. Stuart as to the conversation you had with him after the accident; the carpenter?

A. Yes, I heard him.

Q. I mean after this testimony down in Jacksonville last summer?

A. Yes, I heard it.

Q. Will you tell the jury what conversation you had with Stuart at Jacksonville last August?

Mr. Cunningham: Objected to. He has already testified once.

The Court: Yes; direct his attention to any specific thing, in rebuttal.

Q. Did you talk to him out in the hall after the testimony was given?

A. Yes; we both walked out together, and all I heard him say was, he said, "I am sorry to see you; I wish I had seen you before."

[fol. 187] By the Court:

Q. That was the whole conversation?

A. That was the whole conversation.

Q. You said nothing to him?
A. I answered nothing.
Q. But you said nothing to him before that?
A. No, sir.
Q. And that was all he said to you?
A. Yes.
Q. And you answered him nothing?
A. No, sir.

By Mr. Axtell:

Q. Did you ever see him before?
A. Yes; three weeks before I went on board the "Jacksonville" and I was talking to him before the accident; when the ship came in the first time, I saw him.

(No cross-examination.)

Mr. Axtell: I want to read part of the testimony of one of the defendant's witnesses, whose name was Joseph N. Sautier, who was supposed to have picked him out of the water, taken March 3, 1925, at Kansas City, Missouri. This testimony is at page 6, and begins:

"Q. Now, was there a ladder or gangplank of some size between the decks of the two ships?" (Take in down to and including:) "Q. Was there anything about that ladder or gangplank that was in bad repair or that was dangerous at all?

"A. Nothing whatsoever."

[fol. 188] Now page 9:

"Q. Now, what lines were there, if any, around this ladder?" (Take in down to and including:) "lit up properly."

On page 12:

"Q. Did you notice whether he had been drinking or not?

"A. No, I did not." (Take in:) "And it did not give the accident any more consideration."

"Q. You say you were under the impression that he had come from the 'West Compo' to the 'Jacksonville.' As a

matter of fact, do you know whether he was actually going from the 'West Compo' to the 'Jacksonville' or from the 'Jacksonville' to the 'West Compo'?

"A. I do not."

Mr. Cunningham: I will read some of the deposition which Mr. Axtell did not read, on page 10:

"Q. State whether or not there was a party being given on the 'West Compo' that night.

"A. There was a wedding dinner."

(Take in:)

"Q. Was that ship particularly well lighted on that occasion or not?

"A. Owing to this party, it was."

Mr. Axtell: I will read the depositions of Dr. Baker, Fred Angerholzer, taken the 19th of April, 1926.

(Reads depositions.)

"Deposition of witnesses produced, sworn, and examined on the 19th day of April, 1926, between the hours of 3:30 [fol. 189] and 4 o'clock in the afternoon of that day, at the office of Dowling & Pattison, Bisbee Building, wherein John Johnson is plaintiff and the United States Shipping Board Emergency Fleet Corporation is defendant, on behalf of plaintiff

"APPEARANCES

"The defendant appeared not, either in person or by counsel.

"The plaintiff appeared by Silas B. Axtell; Frank F. L'Engle, of counsel.

"ROBERT N. BAKER, a witness of lawful age, produced, sworn and examined upon his oath, states as follows:

"Direct examination.

By Mr. L'Engle:

"Q. What is your name?

"A. Robert M. Baker, M. D.

"Q. Where do you live now?

"A. Jacksonville.

"Q. How long have you resided in Jacksonville?

"A. Since October 15, 1919.

"Q. Were you in the City of Jacksonville during the months of July and August, 1920?

"A. I was.

"Q. Were you professionally engaged during that time?

"A. I was interne at St. Luke's Hospital, of this city.

"Q. As interne in that hospital, what was the general nature of your duties in regard to patients brought to the hospital?

"A. To attend to emergency cases, give such orders as [fol. 190] were necessary at the time, inform the doctor in charge of the case that had been brought to the hospital, receive his orders and see to it that they were carried out.

"Q. You had some large amount of discretion in emergency cases, did you not?

"A. I had as much as any other interne would have.

"Q. Do you know the plaintiff in this case, John Johnson?

"A. I recall Mr. Johnson indistinctly only.

"Q. Do you know whether or not John Johnson was ever a patient at the St. Luke's Hospital, where you were in 1920?

"A. Yes, sir, he was. He was brought there August 1, 1920.

"Q. Who was supposed to be his physician?

"A. Dr. James B. Parramore, who was at that time a marine surgeon for the Post of Jacksonville.

"Q. Do you remember receiving this John Johnson in that hospital as an injured patient?

"A. I do.

"Q. Can you remember the extent of his physical injury?

"A. As well as I can recall, he was suffering from an injured leg and injury to the skull.

"Q. You do not know of your own knowledge how he obtained this injury, do you?

"A. I do not know.

"Q. Do you know whether or not this John Johnson, at the time he was brought to your hospital, was in an intoxicated condition or under the influence of liquor?

"A. As I have said previously, I remember him indistinctly, but I am quite sure he was not under the influence of alcohol. Had he been markedly so, I am sure it would have made an indelible impression.

"Q. Doctor, upon what foundation do you make this sup- [fol. 191] position as to his being in an intoxicated condition making an impression upon your memory?

"A. Because first, so few drunken patients were brought to the hospital, and I can recall most every case while I was an interne there. Second, had he been drunk it would have excited broad comment. I don't remember anything unusual about the case more than any other accident case.

"Q. If this man had been under the influence of intoxicating liquors, would it have made any change, or any different treatment from any ordinary accident of a similar nature in reference to a stimulant that you might have to give him?

"A. It probably would, because in any treatment to relieve suffering and alleviate pain, special orders would have had to have been written to care for a man in an intoxicated condition.

"Q. You have no independent recollection of anything out of the ordinary other than an ordinary accident case?

"A. No, I only recall it as an ordinary accident case.

"Q. And you think, then, that the question of whether or not this man was under the influence of alcohol or intoxicating liquors would have been sufficiently out of the ordinary to have made you remember the thing very forcibly?

"A. I do.

"Q. But you cannot directly swear that the man was not under the influence of liquor?

"A. I would sooner swear that he was not than swear that he was.

("Hearing continued to Wednesday, 4 p. m.)

[fol. 192] "Thereupon one FRED ANGERHOLZER, having been first duly sworn as a witness upon behalf of the plaintiff, testified as follows:

"Direct examination.

By Mr. L'Engler:

"Q. State your name.
"A. Fred Angerholzer.
"Q. Mr. Angerholzer, where do you live, please, sir?
"A. 128 East Bay Street, Jacksonville, Florida.
"Q. How long have you resided in Jacksonville, Florida?
"A. Twenty-five years.
"Q. All the time at your present address?
"A. 128 East Bay.
"Q. How long have you been engaged in the shipping business?
"A. Since 1907.
"Q. You have during the past ten years furnished ship's crews?
"A. Yes, sir.
"Q. And run a boarding house or hotel?
"A. Yes.
"Q. Were you in that business in 1920?
"A. Yes, sir.
"Q. Did you operate a hotel during that time?
"A. Yes, sir.
"Q. What was the name of that hotel?
"A. Zahm's.
"Q. Are you still operating the hotel?
"A. Yes, sir.
"Q. That is the one you were operating then?
"A. Yes, sir.
"Q. Do you know the plaintiff in this case, John Johnson?
"A. Yes, sir, I do.

"Q. How long have you known him?

"A. I have known him about ten years.

"Q. Well, do you know where John Johnson was staying in August, 1920?

"A. He stopped at my place.

[fol. 193] "Q. About how long had he been with you up until the time he left, in the early part of August, 1920?

"A. He had been staying there about ten days, perhaps.

"Q. Prior to that time, had he ever stayed with you on different occasions?

"A. Yes, sir, several times.

"Q. That was probably when he would come back on other ships?

"A. Yes.

"Q. During the period of time that you knew Mr. Johnson was he a sailor man?

"A. Yes, sir, he was a sailor man.

"Q. And he had been, to your knowledge, a seafaring man for about ten years?

"A. Yes, sir.

"Q. On the occasions that he was stopping at your hotel, did you have opportunity to observe his conduct?

"A. Yes, sir.

"Q. As to sobriety?

"A. Yes, sir.

"Q. Just state generally, in a brief statement, just what kind of a man this John Johnson was?

"A. He was a quiet, decent kind of a fellow, you know, because I never have seen him intoxicated. When he was stopping the last time at my place, I can't remember seeing him intoxicated; he seemed to be a sober man, and quiet and clean. That's all I could say about him.

"Q. Was he ever boisterous or rough acting?

"A. No. Always has been quiet.

"Q. Do you remember about what time he left your place, what day of the month he left your place to go aboard a certain ship?

"A. I do not remember just exactly the date.

"Q. Do you remember that he took a ship in Jacksonville when he was living at your place the last time?

"A. I do.

[fol. 194] "Q. And this was in August of 1920?

"A. In August, 1920.

"Q. Do you remember whether or not you saw him that morning?

"A. I saw him that morning, but I haven't seen him since.

"Q. Was that close around noon?

"A. In the forenoon.

"Q. It was in the forenoon. Do you remember what his condition was at that time, whether or not he was under the influence of intoxicating liquors?

"A. At that time his condition when I seen him, was all right, he was sober then, to my knowledge.

"Q. Did you ever see him after an accident had happened to him aboard a certain ship in this port?

"A. No.

"Q. You have never seen him since the forenoon of the day that he left your place?

"A. No, I never have.

"Q. Do you know of your own knowledge whether or not, after leaving your place, he went aboard a ship known as the steamship 'Jacksonville'?

"A. I was informed he went aboard the steamship 'Jacksonville.'

"Q. You don't know yourself, whether he did or not?

"A. I don't know myself, no, he was to go aboard that ship as a watchman.

"Q. He was a watchman aboard that ship?

"A. Yes, sir.

"Q. During the whole ten years you have known Johnson, and he stopped at your place several times, you have never seen him under the influence of intoxicating liquors, have you?

"A. I don't remember that I ever seen him that way or not.

"Q. But during this time he has been a quiet, decent, well behaved sort of a man?

"A. Yes.

[fol. 195] "Q. You never had any trouble or any objections to him at all?

"A. I never did.

("That's all.)

("Witness excused.")

Plaintiff rests.

MOTION TO DISMISS

Mr. Cunningham: I move to dismiss the complaint herein on the ground that the plaintiff has failed to establish facts sufficient to constitute a cause of action against the defendant and on the ground that he has failed to show any negligence on the part of the defendant, and also the facts disclose that the plaintiff is a licensee and that there is no duty owing by the defendant to the plaintiff arising from that beyond refraining from wilfully injuring him.

The Court: What negligence do you contend?

Mr. Axtell: This was their ship and not only the crew—

The Court: What was the negligence?

Mr. Axtell: Failing to have this gangway properly secured at the lower end, if they were going to use the planks, and in failing to have a proper gangway under the existing circumstances.

The Court: That is the negligence that you are contending?

Mr. Axtell: I do not want to limit myself here to the pleadings. My cause of action is stated in the libel.

The Court: Motion denied, and the defendant may be given an exception. That indicates no opinion on my part, but I think there is a question of fact that I am bound to submit to the jury.

Testimony closed.

Counsel summed up the case.

[fol. 196] CHARGE TO THE JURY

March 28, 1927.

CAMPRELL, J.:

GENTLEMEN OF THE JURY: You are the sole judges of fact. I am not going to spend any time talking to you about the facts because you have heard them. I may refer to some facts in order to make clear my instructions on the law; but because I might pick out some particular fact does not mean that that is more important than the others, except that I find it necessary simply for my explanation. All of

the facts are important, because in approaching a case of this kind we all labor under the limitations of humanity. We are all of us sorry for the man who is hurt. Sorrow in us as individuals in an expression of our individual opinion is perfectly proper. We have a perfect right to be sorry and we have a perfect right to be generous with our own money; but sorrow for someone, coupled with generosity in the expenditure of the money of somebody else, is not your province as jurors.

We started with the proposition that this man has been hurt; but the mere fact that the man suffered injuries, standing by itself, makes no one liable.

Let us get that clear. There can be no liability of any kind on the part of this defendant simply because the man was hurt. There can be no liability at all unless this defendant was guilty of negligence.

I will instruct you on the limit that there may be to their liability because of certain conditions, but I first want you to understand that there must have been negligence or [fol. 197] there is no liability, and then there would not be any necessity of any further consideration.

The defendant has pointed out what it contends was the method of the construction of this gangway. The plaintiff was a seaman, a man who had followed the sea. He says that he was seeking a job. I don't mean a mariner necessarily, but a ship's carpenter, a man who has followed the sea. He testifies to you the way he says this gangway was built. He said he came down the plank safely, and the testimony is that many other people had used the plank. The testimony is that there has been no complaint of any accident to anybody else. He says when he went back to go up the plank something happened. What he says happened was that this plank was swinging as to its end on the side toward the ship. He says it was hanging by a line which ran from the guide to the smokestack, as I remember it. He said that on that end it was not resting on the deck or anything on top of the deck, but that it was hanging on this line, and therefore at that end it could swing.

Now the question first is whether or not that end of that gangplank was resting firmly on the bottom or whether it was swinging. You have heard testimony here by the man who said he made the gangway. You have heard the testi-

mony of others, but you have heard his. You have heard the testimony of Mr. Johnson. Which one of them is right in that particular? Was this gangplank so that it could move sidewise, suspended by a line, or was the end of it resting on a box of some kind which was on the deck of the ship?

[fol. 198] What was the proper way to build the gangplank? Was this gangplank properly constructed? Was it adequate for the purpose for which it was built. Did the accident happen in the way Mr. Johnson says it happened? There is no doubt of the fact that there was a hand line. Mr. Johnson says there was one, and the defendant's witnesses say there was one. Mr. Johnson says that line went through an eye at the top of the stanchion made fast to the gangway. The man who made the gangway says no, that there was no such stanchion, and that in order to place one there he would have had to put holes through and he would have had to put a plate underneath and carry the bolts from the stanchion through that plate underneath, and so fasten it. He says he did not do it.

If the stanchion was there or was not there, did the presence of the stanchion or the absence of the stanchion in any way make this gangway of improper construction? If the stanchion was there and the line led through the stanchion, the hand line, then did the accident happen as Mr. Johnson says it did? If the hand line was there on the right hand side did he fall with his left arm around that stanchion, and did his arm break as he fell?

If the gangplank or gangway was made fast on the ship alongside, lashed as described, and the lower end of that gangplank rested on the box, was that proper construction? Was it a safe construction? Was it one that had been used in safety?

There is no evidence here that any break of any kind was found in the gangway after the time Mr. Johnson said he fell. The gangplank was there, the hand line was there, [fol. 199] and there is no evidence to show that the gangplank was broken or that the hand line was broken or that the gangway was in any way broken. So that it was not the breaking of anything that was there which caused this accident. Negligence cannot be predicated upon that. If there was any negligence at all it would have to be in the construction and the rigging of the gangplank.

It is for you to say whether the accident that this man suffered was the result of some fault in the construction of that gangplank; whether or not that gangplank was in a different condition when he used it than when it had been used before when no accident had happened. There must have been some failure on the part of the defendant to perform some duty which rested upon it.

There has been some talk about the gangway that is made with rollers on the end being a part of the equipment of a ship. That may be so. You have heard the testimony; but if the gangplank that was built was sufficient, was safe, and it was not because of any defect or faulty construction or failure to rig it properly that the accident occurred, and if the gangplank was safe and adequate for the purpose for which it was used, there was no requirement that any particular kind of a gangplank should be used. The only requirement would be that one that was safe and adequate for the purpose should be provided and used.

We want to get that clear, because that is the first proposition before us, whether or not there was any negligence on the part of the defendant, or whether this man who had [fol. 200] followed the sea and who saw this gangplank, who must have walked some distance, according to his own testimony, before he got to the stanchion, because the gangplank was about 12 feet long, as I remember it, and the stanchion was somewhere—I don't know exactly the position, but it is shown on the model and sets somewhere, perhaps not quite at the center; it must have favored one side or the other. Consequently, before the stanchion was reached some steps must have been taken. Was the gangplank swinging? Did he know it was swinging? A man who has followed the sea and was familiar with it, did he continue to descend and use it with knowledge, or did it simply commence to swing at the time when he had reached a point upon it when to go back or to go forward would be about the same thing?

These are things to be considered in arriving at the question of whether or not the gangplank was properly swung. It was there. It was before him. If he couldn't see that it was improperly swung, then of course if he ventured upon it, that is one thing. If he could see it and thought it was improperly swung and if he was cognizant of the re-

quirement, then it is for you to say whether or not in using that and continuing to go on it he himself was guilty of contributory negligence and contributed to the happening of this accident. If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such negligence on his part that it contributed to the accident.

If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory [fol. 201] negligence the verdict would have to be for the defendant.

There has been some evidence here to show how this might have happened. It is a question of fact. Whether or not on the day in question Mr. Johnson and the boatswain were engaged in a pleasant conversation, assisted as might be, by some kind of refreshment, is a question of fact for you. That is only an incident, because the question really is in the beginning whether or not that was a safe, secure gangplank. If the gangplank was safely made and was properly constructed, was properly placed, then if the accident happened by reason of things that the defendant is not chargeable with—whatever they might be—we do not need to spend much time discussing that. It is for you to determine. You do not have to account for everything that made up this situation. The question is whether or not this gangplank was negligently used because improperly constructed or improperly placed. If it was properly constructed, if it was adequate for the purpose, if it was properly placed, then, serious as it might be, whatever might be the reason for the happening of the event, that would not be chargeable to the defendant.

Now there comes another question and that is what right the plaintiff had upon the ship. There has been quite a little testimony taken to show that. As I understand the plaintiff's position—and, gentlemen, it is not my recollection of the testimony nor counsel's but yours, that counts—but as I understand it the plaintiff's position is that he was invited to come on that ship by the boatswain, to get a job. That is my understanding. If I am in error about it, it is [fol. 202] for you to say. I do not understand that Mr. Johnson says that he was invited on the ship to enjoy the fellowship or the society of the boatswain. I do not under-

stand that he testified here that the boatswain invited him down there to pay him a friendly call, as one person might invite another, and that the boatswain might say the ship was his home and he invited Mr. Johnson as his guest to enjoy his society. I do not understand that he so testified. My understanding is that he testified that he was invited to come down there to get a job. If that be so, we are not concerned with an invitation to enjoy society and fellowship. If he was invited by the boatswain to come and get a job, then the question is whether or not the boatswain had authority from the owners—that is, through those representing the owners, his superior officers—to invite this man to come on the ship, because if the evidence satisfies you that the plaintiff came on board on his own business, for the purpose of seeking employment for himself alone, then he was a mere licensee and therefore entered the ship at his own risk, subject to concomitant perils thereof. If he came on the ship at the invitation of the boatswain to get a job, and the boatswain had no authority from those who were over him to extend any such invitation—and I mean by that, if he was not requested by those over him to procure the presence of this man that they might employ him—then he came on board the ship at the invitation of the boatswain thereof and to seek or procure employment for himself and he was a bare licensee, not an invitee, and took the risks that were concomitant with that.

If he was a mere licensee, then the owners of the ship [fol. 203] owed no duty whatever to him as to the condition of the ship, except that the owners should not wantonly or wilfully cause the plaintiff harm or knowingly let him run upon a hidden peril. That is their complaint. The owner could not put the man in a place without warning, and the owner could not suddenly withdraw any protection, but the owner is not held to that high degree of care toward the licensee that he owes toward those who are on the ship at his invitation, or because of their employment, or because they are passengers.

Now, was there any condition of this ship which showed any wanton or wilful carelessness? Was the man subjected to some hidden peril? This is the gangplank; it is open, and he could see it, and he was a man who followed the sea, and if he was a mere licensee there and he could see this

gangplank, was there anything wanton or wilful, or was there any hidden peril to which he was exposed? A person who is neither a passenger, servant, nor a trespasser and not standing in any contractual relation with the owner of the ship, who is permitted to go on the ship for his own interest, convenience, or gratification, is a licensee. That means that if he went on there seeking a job, if the boatswain said there might be a job on the ship, or somebody said to him there might be a job on the ship and he went down there to look for that job he would be a mere licensee. If an officer in authority, primarily the master or the chief officer, who might be charged with the authority of procuring members of the crew, directed or requested the boatswain to get Johnson or to get a man and bring him on the ship, then it is a question for you gentlemen to say [fol. 204] whether or not the man comes on not on his own business alone but on the business of the defendant, in which event a person there because of business with the defendant, not for his own benefit alone, would be a person who was entitled to the same protection as anybody who was directly invited to come on. That is the question, if there was any negligence. If there was no negligence, then all that question of whether he was a licensee or whether he was an invitee of course is of no moment, because if there was no negligence, then there is no liability anyway.

If there was negligence, and if there was a duty greater than that owed to a mere licensee due to Mr. Johnson from this ship and the officers, and if that duty was not performed because of some negligence, such as the failure to perform a duty which, in this instance, would be the failure to properly construct the gangway and properly place it, especially that it be properly placed, because there is no evidence that the gangway or the hand line was broken, and whether that was adequate for the purpose, with forty members of the crew and forty other men working on the ship and using it—if there was negligence then the question of damages will come before you.

It has been stated here and has not been contradicted, that for the two years and a half or three years that Mr. Johnson was receiving medical attention and hospital treatment, he was under no charge. That was all given to him by the Government or governmental agency. Therefore the

question would be a question of pain and suffering and loss to him; if this company was guilty the loss to him of such [fol. 205] use as he may have lost in the arm and knee and such damage as he might have by reason of pain and suffering and decrease in earnings.

The testimony has been offered here that he is working and is receiving pay, the amount of pay being in excess of the amount of money that he received in his former employment; but in the former employment he did receive his maintenance, his room and his food.

So the question rests with you; the question of fact to be determined. Let me repeat it to you. Was there any negligence? Did the defendant fail in the performance of a duty which it owed, or was this purely an accident due to some happening on the part of Mr. Johnson himself—whatever it might have been. If there was any negligence on the part of the defendant, was Mr. Johnson on that ship by the authority of anyone who had a right to invite him there on behalf of the owner, and thus an invitee, or was he a mere licensee as to whom the defendant owed but a limited duty? Because the defendant was not bound to keep the ship in absolutely perfect condition. They were not bound to use the most approved and the best appliances. They were bound to use appliances that were customarily and ordinarily and commonly used and adequate for the purpose for which they were used.

If you should find these questions answered in favor of the plaintiff, then and only then would you come to the question of damages. I have described to you generally what has been shown here as the basis on which they could be secured.

There is a conflict in the testimony, there is no doubt about that. As to many of these questions it depends on [fol. 206] whom you are going to believe. You have a right to consider. The plaintiff is interested. He is seeking to recover. You have his statement of his injuries. They were quite severe. You have a right to consider whether his recollection of what happened at that time is as good as it might have been under other conditions. You have a right to consider here, as to every witness, the long lapse of time, because this happened in 1920 and we are trying the case in 1927.

In determining the weight and credence you are going to give the testimony as to each witness, you have a right to consider their manner and demeanor, the way in which they testify. Did they answer openly, honestly? Did they attempt to hide anything? Did they show any desire for concealment? Was their testimony given in a way that convinced you that as honest men they were telling the truth as they saw it? They didn't have to tell it in your language or in mine, but in their own. Did they impress you—take the witnesses one by one—as being honest? What was their opportunity for observation? That is very important. Who had the best opportunity for observation? Did they testify to more than they could have seen? Did they testify to more than they could remember? Or did they each of them or any of them testify fairly to the things that they clearly could have seen in the positions in which they were placed? Those are matters to determine in deciding who you are going to believe, and you have got to determine who you are going to believe as to the way in which this gangway was built and as to the way in which it was placed. What were their relative opportunities of observation? Whose testimony carries with it the greatest [fol. 207] probative force as being based upon the best observation and the best opportunity for knowledge? That is true of every other incident. I am not trying to go over the testimony, but I must refer to some of it to attract your attention.

Now, in addition to that, it may be possible for you to believe every witness and to get out of their testimony the one story which makes the perfect picture. It is not for me to say whether you can or cannot; but if it is not possible then you have got to determine whether the witnesses were telling the truth, and that applies to every witness, including the plaintiff, because he took the stand as a witness. If you believe that any witness who took the stand knowingly and wilfully testified falsely as to a material fact—not immaterial things—you have a right to disregard all the testimony of that witness. You are not bound to do it, but you may accept that which you believe to be true and reject that which you believe to be false. It is a rule of human reason that has been engrafted on law, and you have applied it day after day in your lives, and prob-

ably never knew that such a rule existed. It is the rule of false in one thing false in all things. In other words a man who tells me a falsehood about a material fact is under grave suspicion as to the other statements that he may make. You have a right to apply that rule. If they are all honest and truthful, if some have made mistakes, if some could not see what they said they saw, then it is for you to determine who is telling the truth.

During the trial, gentlemen, my position required that I should see that the trial was conducted in accordance with [fol. 208] the law. I want you to get out of your minds that I have any opinion on these facts. I have other things to do. It is not for me to determine the facts. That duty rests with you. The responsibility is yours and it is a great responsibility. The responsibility rests with me to inform and to instruct you on the law and you are bound to take my instructions on the law. If you think some of my instructions are not in accordance with your ideas, don't worry about that, because there is a way to correct my errors. I alone am responsible for the instructions on the law, and if I make any errors they can be corrected. You are responsible for the determination of the facts. I indicate to you no opinion. I am not interfering with your prerogative; don't interfere with mine.

If in the course of the trial I have allowed or disallowed evidence, if I have granted or refused to grant motions, that indicates no opinion on my part. You gentlemen can disregard that. That was in the performance of my duty that this trial should be conducted under the form of law.

When you retire, start right. Start as I started. First determine from the ground up, try to determine these issues just as I have presented them to you as to the law, using your own opinion as to the facts; but remember that this case, like every other case, is not to be decided by sympathy. It is not to be decided by vengeance. The object of this action is not to punish anybody. The object of this action, so far as the plaintiff is concerned, is to be reimbursed, to be made whole so far as he may be, so that he would stand forth relatively in the same position that he would stand if the accident had not occurred. You are not [fol. 209] here to mete out punishment or strike a man over the back of anybody. You are here to determine a

question of fact without sympathy, without vengeance, without bias, and not on prejudice or your preconceived opinions; not on anything but the evidence which has come from the mouths of witnesses, as read from the depositions or found in the evidence that has been offered either in the form of models or otherwise.

PLAINTIFF'S REQUESTS TO CHARGE

Mr. Axtell: I have no exceptions, but I will ask if I may make one or two requests as to further charge. I ask your Honor to charge the jury that on considering the question of negligence they may consider the question whether or not they believe from the evidence that a gangway with wheels on it was part of the regular equipment of the ship.

The Court: Yes; but the fact of whether it was or not is not the main question. The question is was the gangway that was provided adequate, proper and safe. That is the question.

Mr. Axtell: Exception. I ask your Honor to charge the jury that the failure of the defendant through its captain or other witnesses to offer any evidence that they made any shoe for the end of the gangplank or rounded off the ends of the planks may be taken into consideration in determining whether the gangway was on the box or was hanging from the ropes.

The Court: I have heard no evidence in the case that that is a proper way to make a gangplank, and neither the jury nor myself have a right to use our judgment as to what was proper, except in line with evidence that has been given on the trial. Whether that would be a proper way to build a gangplank or not has not been testified here. [fol. 210] Mr. Axtell: Sometimes the absence of evidence is evidence.

The Court: I will charge the jury that they are to return a verdict only on the evidence.

Mr. Axtell: Exception. I ask your Honor to charge the jury that if they find that there was a watchman on this pier and that these watchmen permitted the plaintiff to

pass and to go on board the ship, that they may find that he was not a trespasser, at least, on a ship.

The Court: He was a licensee on a vessel. I decline to charge that. I will not charge any more than I have charged. I have told the jury to take into account all the facts. It is for the jury to determine whether he was a licensee or not.

Mr. Axtell: Exception. I ask your Honor to charge the jury that if they find that the gangway was rigged with two lines when the plaintiff went on board and that one of the lines was removed by some member of the crew during the time he was on board so that the plank was caused to move one side with his weight upon it, that that constituted a danger for which they would be liable.

The Court: I decline to assume the prerogative of the jury.

Mr. Axtell: Exception. I ask your Honor to charge the jury the rules on the question of contributory negligence as to this maritime law.

The Court: I decline. The action does not lie in admiralty and was not so brought.

Mr. Axtell: Exception.

Mr. Cunningham: I ask your Honor to charge the jury that they may consider the failure on the part of the plaintiff to call the boatswain, who he alleges invited him on [fol. 211] board the ship at the request of the officers.

The Court: The jury have a right to consider everything; but on the testimony I cannot charge that. He has accounted for his failure to call that witness.

VERDICT

(The Marshal is sworn and the jury retire at 6:05 P. M. and return at 9 P. M. with a verdict for the defendant.)

MOTION TO SET ASIDE VERDICT

Mr. Axtell: I move to set aside the verdict, on the ground that it is contrary to the weight of evidence, and on all the grounds specified in Section 549 of the Civil Practice Act.

Motion denied.

Mr. Axtell excepts.

ORDER SETTLING BILL OF EXCEPTIONS

Upon the annexed stipulation, the foregoing bill of exceptions is hereby settled and allowed, consented and ordered on file, and made a part of the record in this cause.

Dated September 21, 1927.

Marcus B. Campbell, U. S. D. J.

[fol. 212] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SETTLING BILL OF EXCEPTIONS

It is hereby stipulated, consented and agreed by and between the attorneys for the respective parties hereto that the foregoing bill of exceptions contains all the evidence introduced on the trial of this action and contains all the objections and exceptions made during the trial of this action, and that the same may be settled and allowed, signed, filed and made a part of the record in the above entitled cause.

Dated New York, August 8, 1927.

Silas B. Axtell, Attorney for Plaintiff. William A. DeGroot, United States Attorney, Attorney for Defendant.

[fol. 213] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

John Johnson, plaintiff herein, feeling himself aggrieved by the verdict herein in favor of the defendant, and by the judgment entered and filed in this cause in the office of the Clerk of the United States District Court for the Eastern District of New York on the 18th day of April, 1927, in favor of the defendant, United States Shipping Board Emergency Fleet Corporation, and against the plaintiff, John Johnson, for the sum of Twenty-five ($25.00) Dollars,

comes now by Silas B. Axtell, his attorney and prays for the reversal of said judgment, and to that end *and* prays that a writ of error may issue in his behalf to the United States Circuit Court of Appeals for the Second Circuit for the correction of errors, so complained of, all of which will more in detail appear from the assignment of errors which is filed with this petition; and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Circuit Court of Appeals.

Dated New York, June 1st, 1927.

Silas B. Axtell, Attorney for Plaintiff. Office & P. O. address: 11 Moore Street, New York, N. Y.

[fol. 214] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

This, the 20th day of June, 1927, came the plaintiff by his attorney and filed herein and presented to the Court his petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error.

Dated June 20, 1927.

Marcus B. Campbell, U. S. D. J.

[fols. 215 & 216] Citation, in usual form, showing service on Wm. A. DeGroot, omitted in printing.

[fol. 217] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

The plaintiff in this action, in connection with his petition for a writ of error makes the following assignment of errors, that he avers were committed upon the trial of the above entitled cause, to wit:

1. That the verdict of the jury was contrary to the weight of evidence, and that the Court erred in denying plaintiff's motion to set the verdict aside.

2. That the trial Court erred in charging the jury as follows: "If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant."

Dated New York, June 1st, 1927.

Silas B. Axtell, Attorney for Plaintiff. Office & P. O. address: 11 Moore Street, Borough of Manhattan, City of New York.

[fol. 218] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 12

ANDREU

Cross:

A. I have.

Q. Then the end of the gangplank resting on the "West Campo" was about three or four feet higher than the end resting on the "Jacksonville"?

A. The "Jacksonville" end was the lowest.

Q. About how much lower was the "Jacksonville" end than that on the "West Campo" end?

A. Around four feet.

Q. Do you remember how the end of the gangplank was made fast on the "Jacksonville"?

A. It was on a box.

Q. Do you know whether the end of the gangplank was lashed to any part of the ship on the "Jacksonville," or just resting on the box?

A. I don't know. It was on a box is all I know, sir.

Q. Was there any stanchion or handrail on this gangplank?

A. Yes.

Q. There was a stanchion on it?

A. Yes.

Q. Do you know what the stanchion was made out of?

A. Made of an iron pipe.

Q. Was that made fast to the gangway?

A. Yes.

Q. Do you know whether or not there was a line made fast to that stanchion?

A. Yes.

Q. Then the line, one end then was carried to the "West Campo" and made fast, and the other end made fast on the

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[fol. 219] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 13

ANDREU

Cross:

A. Yes.

Q. Were you on a watch?

A. No, sir.

Q. You were one of the day gang?

A. Yes, sir.

Q. Do you remember whether or not you were working that day?

A. I was working that day, yes.

Q. What time of day was it you saw Mr. Johnson in the water? Between these two ships?

A. It was night.

Q. Was it light or dark?

A. Dark.

Q. This was in August, 1920?

A. I couldn't say. It was in 1920 but what month I don't know.

Q. Was it soon after you went aboard the "Jacksonville"?

A. About two weeks.

Q. And you went aboard in July?

A. I don't remember when I went aboard.

Q. Well, was it in the summer or fall?

A. It was summer.

Q. Then it had to be somewhere around seven o'clock at night to be dark?

A. Not necessarily.

Q. Do you know whether the sun was up or not?

A. It was down.

Q. Did this accident happen after you had knocked off for the day?

A. Yes.

Q. How much higher was the "West Campo" than the "Jacksonville" out of the water?

[fol. 220] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated, consented and agreed by and between the attorneys for the respective parties hereto that all of the exhibits marked in evidence during the trial of the above entitled case need not be reproduced in the record on appeal, but may be offered at the argument of the appeal, by counsel for either side.

Dated New York, October 5, 1927.

Silas B. Axtell, Attorney for Plaintiff. William A. De Groot, United States Attorney, Attorney for Defendant.

[fol. 221] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated, consented and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled action as agreed on by the parties for the purposes of this appeal.

Dated New York, October 5, 1927.

Silas B. Axtell, Attorney for Plaintiff. William A. De Groot, United States Attorney, Attorney for Defendant.

[fol. 222] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 223] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1927

No. 194

Argued March 8, 1928. Decided March 19, 1928

JOHN JOHNSON, Plaintiff in Error,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant in Error

In Error to the District Court of the United States for the Eastern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

OPINION

Writ of error to the District Court for the Eastern District of New York. Suit by John Johnson, plaintiff, against the United States Shipping Board Emergency Fleet Corporation, defendant. Judgment for defendant; plaintiff appeals. Affirmed.

Silas B. Axtell, of New York City (Myron Scott, of New York City, of counsel), for plaintiff in error.

William A. De Groot, U. S. Atty., of Brooklyn, N. Y. (Edgar G. Wandless, and Frederick H. Cunningham, both of New York City, of counsel), for defendant in error.

PER CURIAM:

This action was brought to recover for personal injuries sustained by the plaintiff in error, who said he was an invitee—seeking employment as a ship's carpenter—on one of the defendant in error's boats, and was injured while walking on a gangplank, which he claimed was not firmly in place. The jury found against him on the issue of negligence.

The plaintiff in error assigns error for the charge of the court, which instructed the jury that, if the plaintiff in error was guilty of contributory negligence, he could not recover. The plaintiff in error now argues that this was a maritime tort, and that the maritime law controls, and therefore the contributory negligence was not an absolute bar to a recovery. We think the court correctly instructed the jury, under the authority of Belden v. Chase, 154 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218, Atlee v. Packet Co., 21 Wall. 389, 22 L. Ed. 619, and Maleeny v. Standard Shipbuilding Co., 237 N. Y. 250, 142 N. E. 602. We have not overlooked the Castagna Case (C. C. A.) 280 F. 618 where, in a dictum, it was inadvertently stated the rule is different than stated in Belden v. Chase, supra.

Judgment affirmed, with costs.

[fol. 224] IN UNITED STATES CIRCUIT COURT OF APPEALS

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 26th day of March, one thousand nine hundred and twenty-eight.

[Title omitted]

Error to the District Court of the United States for the Eastern District of New York

DECREE—Filed March 28, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[File endorsement omitted.]

[fol. 225] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 226] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,529. U. S. Circuit Court of Appeals, Second Circuit. Term No. 220. John Johnson, petitioner, vs. United States Shipping Board Emergency Fleet Corporation. Petition for writ of certiorari and exhibit thereto. Filed June 22nd, 1928. File No. 33,529.

FILE COPY

FILED
JUN 22 1928
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

JOHN JOHNSON,

Petitioner,

against

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SILAS B. AXTELL,
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of Counsel.

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IN THE

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JOHN JOHNSON,

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UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

JOHN JOHNSON, your petitioner, respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled action on the 26th day of March, 1928.

The Matter Involved.

ONE.—The petitioner is a citizen of the United States, age about 55 years (R., 14), and is and for many years

has been a merchant seaman by vocation, and for a number of years has shipped as bos'n on merchant vessels (R., 15). The respondent is a corporation organized under the laws of the District of Columbia, and is engaged in the business of operating merchant vessels under the American flag.

Two.—On October 1, 1920, the day of the accident, the *S/S Jacksonville,* an American vessel, owned and operated by the respondent, was lying in navigable waters of the United States, to-wit, in the harbor of Jacksonville, Florida, alongside the *S/S West Compo* with one gang-plank stretched between the *S/S Jacksonville* and the *S/S West Compo* and one gang-plank stretched between the *S/S West Compo* and the dock (R., 126, 15, 16).

Three.—While petitioner was at a hotel at Jacksonville, Florida, on October 1, 1920, the bos'n of the *S/S Jacksonville,* came to the petitioner who was in his room in his hotel and told petitioner that a man was wanted on board the vessel as a carpenter or handy-man and asked petitioner to go with him on board said vessel and see the ship's officer with respect to signing on. Petitioner accompanied the bos'n who paid petitioner's street car fare (R., 15), and went on board the *S/S Jacksonville,* crossing over the deck of the *S/S West Compo* which lay between the *S/S Jacksonville* and the dock and crossing a gang-plank from the deck of the *S/S West Compo* to the *S/S Jacksonville* (R., 15).

Four.—After waiting on board a short time for the ship's officer who was ashore, the petitioner started to return to the hotel where his working clothes were, with a view of returning with his clothes the next day (R., 18).

FIVE.—The gang-plank between the *S/S Jacksonville* and the *S/S West Compo,* was on a steep slant, downward toward the *S/S Jacksonville,* and upward toward the *S/S West Compo,* so that as petitioner started to return to the shore, he climbed upward on this gang-plank (R., 16, 19, 149). The gang-plank was insecure and moved to one side when he got about half way upward from the *S/S Jacksonville's* deck. He was caused to lose his balance and fall. As he fell he caught his arm around a steel stanchion to which he held until his arm broke, whereupon he fell between the vessels (R., 19). As a result of the fall petitioner sustained besides a broken arm, a fracture of the skull, scalp wounds, several broken bones, broken jaw bones, injuries to the kneecap and shoulder blades (R., 19, 20, 21, 27, 71).

SIX.—The gang-plank was but a makeshift gang-plank suspended between two vessels, and on the *S/S Jacksonville's* end, was supported and steadied by only one rope on one side of the plank suspended from a smoke-stack guy (R., 46, 60, 16, 185). The deck of the *S/S Jacksonville* at this point was a canvas-covered deck, and merely to protect the canvas, the makeshift gang-plank had been rigged up so that at the *S/S Jacksonville's* end it rested on a shaky box instead of upon the deck (R., 175, 185, 47). The presence of only one line from the smoke-stack guy on the one side of the gang-plank left it wholly insecure. Even one of defendant's witnesses described it as "a fool-rigged gangway" (R., 184). As the gangway was about 12 feet long, and the *S/S West Compo* 8 to 10 feet higher in the water than the *S/S Jacksonville,* the angle of the make-shift gangway rendered it even more insecure when climbing upward upon it. Petitioner failed to notice when he stepped up from the deck of the *S/S Jacksonville's* end of the gang-plank that it was insecurely fastened, and did not

notice it until it began to shake and when he was midway between the vessels. Then it was too late (R., 16).

SEVEN.—With respect to the petitioner's failure to observe the insecure fastening of the gang-plank, the Court charged:

> "If he could see it and thought it was improperly swung and if he was cognizant of the requirement, then it is for you to say whether or not in using that and continuing to go on it he himself was guilty of contributory negligence and contributed to the happening of this accident. If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such neglect on his part that it contributed to the accident.
>
> If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such negligence on his part that it contributed to the accident. If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant" (R., 200, 201).

On exception and request by counsel the Court further charged:

> Mr. Axtel: Exception. I ask your Honor to charge the jury the rules on the question of contributory negligence as to this maritime law.
>
> The Court: I decline. The action does not lie in admiralty and was not so brought.
>
> Mr. Axtell: Exception" (R., 210).

EIGHT.—On request by petitioner's counsel to charge that if the jury found that the watchmen on the pier permitted plaintiff to pass and get on board the ship that petitioner was "not a trespasser at least," the Court further charged the jury as follows:

> "The Court: He was a licensee on a vessel. I decline to charge that, * * * etc." (R., 210).

NINE.—The jury was out from 6:05 P. M. to 9 P. M. and returned with a verdict for the defendant. A motion made by petitioner's counsel to set aside the verdict was denied with exception. Judgment was entered for the defendant (R., 211).

TEN.—Petitioner thereupon duly procured a writ of error to take the case before the Circuit Court of Appeals for the Second Circuit and filed a bill of exceptions together with two assignments of error, as follows:

> "That the verdict of the jury was contrary to the weight of evidence, and that the Court erred in denying plaintiff's motion to set the verdict aside.
>
> "That the trial Court erred in charging the jury as follows: 'If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant' " (R., 217).

ELEVEN.—The Circuit Court of Appeals ruled herein as follows:

> "The plaintiff-in-error assigns error for the charge of the Court, which instructed the jury that if the plaintiff-in-error was guilty of contributory negligence he could not recover. The plaintiff-in-error now argues that this was a maritime tort, and

that the maritime law controls, and, therefore, the contributory negligence was not an absolute bar to a recovery. We think the Court correctly instructed the jury under the authority of Belden vs. Chase, 150 U. S., 674, 14 S. Ct., 264, 37 L. Ed., 1218; Atley vs. Packet Co., 21 Wall., 389, 22 L. Ed., 619, and Maleeny vs. Standard Shipbuilding Co., 237 N. Y., 250, 142 N. E., 602. We have not overlooked the Castagna case (C. C. A.), 280 F., 618, where, in a dictum, it was inadvertently stated the rule is different than stated in Belden vs. Chase, supra.

Judgment affirmed, with costs."

TWELVE.—The foregoing per curiam opinion of the Circuit Court of Appeals for the Second Circuit rendered March 19, 1928, was made the basis of a decree of that court rendered and entered the 26th day of March, 1928, to review which this appeal for a writ of certiorari is made.

Reasons Relied Upon for the Allowance of This Writ.

THIRTEEN.—Upon the foregoing specifications of fact as to the plaintiff's case and upon the charge of the lower Court and the decision and decree of the Circuit Court of Appeals for the Second Circuit, an important question of federal law has been decided in a way that is in conflict with the applicable decisions of this Court.

The decisions relied upon are those in the cases of *Chelentis* vs. *Luckenbach Steamship Company*, 247 U. S., 372 (1918); *Atlantic Transport Company* vs. *Imbrovek*, 234 U. S., 52 (1913); the *Port of New York Stevedoring Co.* vs. *Castagna*, 258 U. S., 631 (1922); *Carlisle Packing Co.* vs. *Sandanger*, 259 U. S., 255 (1922); *Southern Pacific Co.* vs. *Jensen*, 244 U. S., 205 (1917), and *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S., 149 (1919).

In these cases this Court has stated in clear and emphatic terms that every specie of tort occurring on navigable waters, is of admiralty cognizance; that the general rules of maritime law apply whether the proceeding be instituted in an admiralty or common law court; that the right to recover, irrespective of contributory negligence is a matter of right and not a matter of procedure. The charge of the lower Court as sustained upon appeal, in view of these decisions, whether proceeding from a mistaken opinion that contributory negligence is a matter of remedy rather than of right, or from a mistaken view as to the applicability of the old cases of *Belden* vs. *Chase* and *Atlee* vs. *Packet Co.*, supra, is wholly erroneous.

FOURTEEN.—There is a confusion in the law of the several states and in the federal courts as to the right to recover irrespective of contributory negligence where action for a maritime tort is brought in a common law court, and the public interest will be promoted by the prompt settlement in this court of the questions involved in this case.

The cases showing this confusion upon this point of the law on the part of the lower Courts are: *J. H. Burton & Sons Co.* vs. *May*, 212 Ala., 435 (S. Ct., Ala., 1925), 1925 A. M. C., 707; *Joyce* vs. *Convoy S. S. Co.*, 17 F. (2d), 482 (D. C., Me., 1924); *McPherson* vs. *Twin Harbor S. & T. Co.*, 1926 A. M. C., 1030 (S. Ct., Washington, 1926); *Kennedy* vs. *Cunard S. S. Co.*, 197 A. D., 459 (1921), affirmed 235 N. Y., 604 (S. Ct., New York, 1923); *Maleeny* vs. *Standard Shipbuilding Co.*, 237 N. Y., 250 (S. Ct., New York, 1923).

FIFTEEN.—In the refusal of the trial Court, sustained on appeal, to charge that the petitioner, upon the facts as stated in his case, did not have the legal status of "*seaman,*" which would have entitled him to the charge requested both as a matter of statutory law and court decision, an erroneous decision has been made upon an important question of federal law which has not been, but should be, settled by this Court.

The contention is sustained by sound argument and by a consideration of the following authority: U. S. Code, Tit. 46, Sec. 713; *International Stevedoring Co.* vs. *Haverty,* 272 U. S., 50 (1926); U. S. Code, Tit. 46, Sec. 688, as incorporating U. S. Code, Tit. 45, Sec. 53.

SIXTEEN.—The refusal of the trial Court, sustained on appeal, to charge that the petitioner on the facts as stated by him was not "a trespasser at least" or in other words, a licensee or invitee, is a decision prejudicial to the substantial rights of the petitioner in that it aided in depriving him of the ruling requested, and is a decision in conflict with the previous decisions of this Court.

The decision of the trial Court was opposed to the leading case of *Leathers* vs. *Blessing,* 105 U. S., 626 (1881), and to the later case of *Anderson* vs. *The E. B. Ward, Jr.,* 38 Fed., 44 (1889).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out under the seal of this honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, demanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of the proceedings in the case numbered and indexed on its Docket, No. 194, October Term, 1927, and that the said decree of said court may be reversed by this honorable Court and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem just and proper.

Respectfully submitted,

JOHN JOHNSON,
Petitioner,

By SILAS B. AXTELL,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

JOHN JOHNSON,

Petitioner,

against

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Decision of the Lower Court.

The opinion of the United States Circuit Court of Appeals for the Second Circuit, not yet officially reported, is annexed to the record on appeal on page 223, together with the decree entered by the Court upon that decision. The decision and opinion of the Court was made March 19, 1928.

The charge of the District Court of the United States for the Eastern District of New York is not reported but is set out verbatim in the record on pages 196-211, inclusive.

Jurisdiction.

The date of the decree to be reversed, is March 26, 1928 (R., 223).

This application for a writ of certiorari is made in time within the meaning of Section 8(a) of the Jurisdictional Act of February 13, 1925, which provides that no writ of error intended to bring any judgment or decree before the Supreme Court shall be allowed or entertained unless application therefore be duly made within three months after the entry of such judgment or decree.

It is undisputed that the subject matter of this action is that of a maritime tort arising out of personal injuries occurring and caused upon navigable waters of the United States (R., 126, 15, 16), of which this Court has jurisdiction (*Atlantic Transport Co.* vs. *Imbrovek,* 234 U. S., 52, 1913).

The specific claims advanced, the errors relied upon and the rulings of the lower Court, together with the cases relied upon, and the reasons advanced for the taking of jurisdiction by this Court are stated in the foregoing petition and for the sake of brevity are not repeated at this point.

Statement of Case.

A full statement of the case has been given in the petition and in the interest of brevity that statement is referred to here and is not repeated.

Assignment of Errors.

(1) The lower Court erred in holding that the trial Court correctly instructed the jury that if the petitioner was guilty of contributory negligence he could not recover.

(2) The lower Court erred in failing to hold that petitioner had the legal status of "seaman" for the purpose of entitling him to the ruling that his contributory negligence was not a bar to a recovery, providing the jury found that the petitioner was on board defendant's ves-

sel at the defendant's specific instance and request with respect to employment.

(3) The lower Court erred in failing to hold that the petitioner was a licensee or invitee for the purpose of entitling him to the ruling that his contributory negligence was not a bar to a recovery, providing the jury found plaintiff was on board the defendant's vessel at the defendant's specific instance and request.

ARGUMENT.

FIRST.

In the decisions of the lower Court an important question of Federal law has been decided in a way that is in conflict with the applicable decisions of this Court.

This Court has squarely held that, in an action for a maritime tort, brought in a common law court, the substantive rules of common law relating to non-maritime torts are not applicable, and that the substantive rules of maritime law are applicable to the adjudication of an action for a maritime tort, whether the proceeding therefore be brought in an admiralty court or in a common law court.

Chelentis vs. *Luckenbach S. S. Co.*, 247 U. S., 372 (1917);

Port of New York Stevedoring Co. vs. *Castagna*, 280 F., 618, 258 U. S., 631 (1922);

Carlisle Packing Co. vs. *Sandanger*, 259 U. S., 255, 259 (1922);

Southern Pacific Co. vs. *Jensen*, 244 U. S., 205 (1917);

Knickerbocker Ice Co. vs. *Stewart*, 253 U. S., 149 (1919);

Atlantic Transport Co. vs. *Imbrovek*, 234 U. S., 52 (1913).

In the *Chelentis* case, supra, an action at law, a person employed on a steamship as a fireman lost a leg, having been injured while in the performance of his duties; the vessel being at sea. He brought an action in a state court to recover damages, and the action was removed to the U. S. District Court because of diverse citizenship. Under the maritime law a seaman was entitled to recover for only maintenance, cure and wages. He claimed, however, to be entitled by the law of the State of New York to recover full common-law indemnity. But the Supreme Court held, affirming the decision of the lower Court, that the liability which existed under the maritime law was not subject to be enlarged to the full common-law indemnity by the law of the state. It was held that no state has the power to abolish the well-established maritime rule concerning the measure of recovery and substitute therefore the rule of the common law. The Court said:

> "Plainly, we think, under the saving clause *a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law;* but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, *without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.*" (Italics ours.)

In the case of the *Port of New York Stevedoring Company*, supra, an action at law, a longshoreman was precipitated into the hold of a steamer that was in navigable waters of the United States, when a rotten board, of which he had taken hold, broke. There was a question

as to whether the condition of the board was so plainly observable that an ordinarily prudent person would have appreciated the defect. In upholding the right of the plaintiff to recover irrespective of his contributory negligence, in a common law action, the Court, *Mayer*, J., stated on page 624, the reason therefore to be that the matter is one of right and not of remedy:

> "*The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum.* In the case at bar, plaintiff sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common-law court with the same right as he would have entered the admiralty court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, *and this right of plaintiff sprang into existence because he suffered a maritime tort.* The trial judge was peculiarly familiar with the question, for it was he who wrote the opinion in Carter vs. Brown, supra, and our view is that his charge as to contributory negligence was sound." (Italics ours.)

In the opinion of the Circuit Court denying the petitioner the right to recover irrespective of his contributory negligence (R., 223), the Court refers to this part of the opinion in the *Port of New York Stevedoring Company* case as an inadvertence. This statement probably proceeds from the Court's statement in that case that "so far as we are able to ascertain, there was no evidence of contributory negligence, and this part of the Court's charge was doubtless due to extraordinary caution. The question of the contributory negligence seems on this record to be academic." It is sufficient to state, in answer to the Circuit Court's characterization of this holding as

inadvertence, that the question of the evidence of contributory negligence was one of fact for the jury and that, therefore, the ruling of the Court on this subject was directly in point. The Supreme Court denied a writ of certiorari in this case (257 U. S., 618, 1922).

In the *Carlisle Packing Company* case, supra, this Court sustained a judgment obtained in a trial Court for personal injuries suffered while the petitioner was employed on a motorboat in Alaskan waters. In upholding the right to recover for the unseaworthiness of the ship in a common-law court it was said on page 259,

> "the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court."

The extract from the opinion in the *Carlisle Packing Co.* case, supra, is merely a reaffirmance by this Court of the rule first announced in the *Chelentes* case, supra, which it cites. The development of the rule and the reasons therefor are fully explained in the case of *Southern Pacific Co.* vs. *Jensen,* 244 U. S., 205 (1917) and *Knickerbocker Ice Co.* vs. *Stewart,* 253 U. S., 149 (1919).

The principle that the maritime law extends to all cases of maritime tort occurring on navigable waters is well stated in the *Imbrovek* case, supra, which is the starting point of the principle developed in the foregoing cases. The Court, *Hughes,* J., said in this case:

> "Every specie of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The cases relied upon by the lower Court as sustaining the ruling that in an action at law for a maritime tort, contributory negligence is a bar, are wholly inapplicable on their facts and doctrines, and were decided long before the real extent and character of the admiralty law

was developed by this Court, beginning with the *Imbrovek* and related cases, cited supra.

The case of *Belden* vs. *Chase,* 150 U. S., 674, was decided in 1893 prior to all the later and better reasoned cases of this Court upon the particular type of case now presented, to wit, maritime tort for personal injuries. It concerned the collision of two steamships in the Hudson River, and was a review of a case coming from the state courts of New York, at that time limited in their maritime jurisdiction.

The case of *Atlee* vs. *Packet Co.,* 21 Wall., 389, was decided by this Court in 1874 and was upon a libel in admiralty. It concerned a collision between a barge and a pier in the Mississippi River. Manifestly anything there said as to the effect of contributory negligence in a suit at common law was dicta.

The case of *Maleeny* vs. *Standard Shipbuilding Co.,* 237 U. S., 250, aside from being a state court case, relies largely upon the decision in *Belden* vs. *Chase,* supra. In the *Maleeny* case, at page 262, the Court stated that that Court should follow the ruling of the United States Supreme Court in the case of *Belden* vs. *Chase* until that Court modifies or limits this authority, evidently not agreeing with that case as applicable to the maritime law as it existed at the time of the decision, 1923.

SECOND.

There is confusion in the law of the several states and in the Federal Courts as to the right to recover for a maritime tort in a common law court irrespective of contributory negligence, and the public interest will be promoted by a prompt settlement of this question by this Court.

The lack of an authoritative decision upon the point as to the effect of contributory negligence in an action to

recover for a maritime tort in a common-law court, has resulted, as may have been expected, in conflicting decisions in the courts of the various states and in the lower federal courts.

J. H. Burton & Sons Co. vs. *May*, 212 Ala., 435, 1925 A. M. C., 707 (S. Ct., Alabama, 1925);
Joyce vs. *Convoy S. S. Co.*, 1 F. (2nd), 482 (D. C., Maine, 1924);
McPherson vs. *Twin Harbor S. & T. Co.*, 1926 A. M. C., 1030 (S. Ct., Washington, 1926);
Kennedy vs. *Cunard S. S. Co.*, 197 A. D., 459 (1921), affirmed 235 N. Y., 604 (S. Ct., New York, 1923);
Maleeny vs. *Standard Shipbuildng Co.*, 237 N. Y., 250 (S. Ct., New York, 1923).

The Supreme Court of Alabama in the *J. H. Burton & Sons Co.* case, supra, an action at law, decided in favor of the ruling contended for by the petitioner. This Court recognized the existing authority of *Belden* vs. *Chase*, but boldly made its decision under the authority of this Court as announced in the later cases of *Chelentis* vs. *Luckenbach* and *Carlisle Packing Co.* vs. *Sandanger*, supra. The Court stated:

> "A claim in a state court in an action for a maritime tort committed upon navigable waters and within the admiralty jurisdiction of a right under the Federal statute presents a Federal question, and that jurisdiction cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common-law remedy in a state court. On the authority of Atlee v. Northwestern Union Packet Co., 88 U. S. (Wall.), 389, 22 L. Ed. 619, it was held that, if both vessels are culpable in respect of operating, etc., neither can recover damages for injuries so caused. Belden v. Chase, 150 U. S., 674,

14 S. Ct., 264, 37 L. Ed., 1218. *However, by the later cases it has been held by the Supreme Court of the United States that the general rules of maritime law apply to suits for maritime torts brought in the common-law courts of the United States* Carlisle Pack. Co. v. Ole Sandanger, 259 U. S., 255, 42 S. Ct., 475, 66 L. Ed., 927; Chelentis v. Luckenbach, etc., Co., 247 U. S., 372, 38 S. Ct., 501, 62 L. Ed., 1171; Knickerbocker, etc., Co. v. Stewart, 253 U. S., 149, 40 S. Ct., 438, 64 L. Ed., 834, 11 A. L. R., 1145; South. Pac. Co. v. Jensen, 244 U. S., 205, 37 S. Ct., 524, 61 L. Ed., 1086, L. R. A., 1918C, 451, Ann. Cas., 1917E, 1900; and that every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance (Atlantic Trans. Co. v. Imbrovek, 234 U. S., 52, 32 S. Ct., 835, 56 L. Ed., 1263, 58 L. Ed., 1208, 1212, s. c., 51 L. R. A. [N. S.], 1157, note), or is of common-law cognizance within the jurisdiction saved 'to suitors in all cases (where) the right of a common-law remedy (exists) when the common-law is competent to give it.' South. Pac. Co. v. Jensen, 244 U. S., 205, 37 S. Ct., 524, 61 L. Ed., 1086, 1099, L. R. A., 1918C, 451, Ann. Cas., 1917E, 900; Steamer Max Morris v. Curry, 137 U. S., 1, 11 S. Ct., 29, 34 L. Ed., 586, 589." (Italics ours.)

The Federal District Court of Maine in substance decided the principle of law as contended for by the petitioner by holding that in an action brought to recover for a maritime tort under a death statute of Maine, contributory negligence must be determined not under the common law, but under the maritime law. This Court said in the *Joyce* case, supra:

"It is clearly my duty to follow the law laid down by the Supreme Court in Southern Pacific Co. vs.

> Jensen, 244 U. S., 215, 37 Sup. Ct., 524, 61 L. Ed., 1086, L. R. A. 1918C, 451 Ann. Cas., 1917 E., 900, supra. It is not for me to determine the duty of a state court; *but I think a state court in case of a maritime tort should also be controlled by the same maritime rule laid down by the Supreme Court of the United States, and that it should not follow the common-law rule of procedure which it would follow in a case not maritime in its nature,* * * *." (Italics ours.)

In the *McPherson* case, supra, the Supreme Court of Washington sustained a verdict for the plaintiff and held, on page 1034, that the common-law rule of contributory negligence that was charged was not correct, but that there was no reversible error inasmuch as the verdict would have been for the appellant even though the jury had found contributory negligence. The head-note to this case is wrongly edited.

In the *Kennedy* case, supra, the Appellate Division of the First Department of New York held, prior to the *Maleeny* case, supra, in an action at law by a longshoreman to recover for injuries received by falling into an open hatchway, that the rules relating to contributory negligence should be determined by the maritime law and not by the common law. The Court said on page 409:

> "The instant case is an action for damage for personal injuries, for which there exists in this state a common-law remedy. Therefore, the action may be brought in our Supreme Court, *the rules of practice, pleading, and evidence of our courts apply,* and the cause will be tried in conformity therewith, *but the rules relating to contributory negligence, acts of fellow servants, and the measure of recovery must be determined by the maritime law, and not by the common law.*" (Italics ours.)

The *Kennedy* case was affirmed without opinion by the Court of Appeals in April, 1923, the Court stating, however, that the question of comparative negligence was not passed upon. In December of that year the *Maleeny* case was decided with an extended opinion, mentioned, supra, which must be interpreted as having overruled the *Kennedy* case.

From these cases it would seem that the lack of an authentic decision by the Supreme Court upon this important point of maritime law has led the lower courts to follow an outworn principle of admiralty law. The later expressions of the proper application and scope of the maritime law as developed in recent years, by this Court, clearly show the conflicting trend of the decision and decree of the Circuit Court in this case.

THIRD.

In refusing to accord petitioner the legal status of seaman which would have entitled him to the admiralty rule of contributory negligence requested, an erroneous decision has been made upon an important question of Federal law which has not been but should be settled by this Court.

Petitioner was a seaman by vocation (R., 15). It was at the specific instance and request of respondent that the petitioner went on respondent's ship in respect to employment (R., 15). The petitioner is justly entitled to the classification of seamen for the purpose of recovering for a maritime tort, for which respondent is responsible.

International Stevedoring Co. vs. *Haverty*, 272 U. S., 50 (1926);
U. S. Code, Tit. 46, Sec. 688, as incorporating *U. S. Code*, Tit. 45, Sec. 53;
U. S. Code, Tit. 46, Sec. 713.

In the case of the *International Stevedoring Company*, supra, the Court allowed a stevedore, although not in the strict sense a seaman, to have the benefit of the provisions of the Seamen's Act abolishing the fellow servant rule in order to sustain a recovery.

The specific request made to the petitioner by the ship's officer duly authorized (R., 106, 107, 108), to leave his hotel and go on board the ship, was the first act of an employment, constituting petitioner a seaman within the meaning of the *Jones* Act, *U. S. Code*, Tit. 45, Sec. 713, which would have entitled him to a ruling that his contributory negligence was not a bar, *U. S. Code*, Tit. 46, Sec. 688, as incorporating *U. S. Code*, Tit. 45, Sec. 53.

The prospect of employment held out to petitioner was specifically that of a "seaman" and in responding to the request of the respondent, a definite contractual status was established as to a maritime matter, which in fact and law made him a "seaman."

FOURTH.

In the refusal to charge, that if the jury found the facts to be as stated by the petitioner, the petitioner was an invitee or licensee, or at least not a trespasser, which would have entitled the petitioner to the admiralty ruling requested, a decision was made in conflict with the applicable decisions of this Court.

Whether or not the legal status of the petitioner was properly that of a seaman, it is submitted that in any event, on the facts of his case, he was an invitee or licensee and as such was entitled to bring an action against respondent for the maritime tort which he suffered.

> *Leathers* vs. *Blessing*, 105 U. S., 626, 629 (1881);
> *Anderson* vs. *The E. B. Ward, Jr.*, 38 F., 44 (1889).

In *Leathers* vs. *Blessing*, a leading case on this subject, this Court was of the opinion that an invitee who suffered personal injuries on the vessel could recover, therefore, although he sustained only the relation of invitee toward the ship. Blessing had gone on board the steamboat on a matter of business relating to a consignment of cottonseed on board the boat. It was held in a libel action that he could recover for the neglect or malfeasance of the owners. Libellant was not found to be guilty of contributory negligence, but it was decided that the injury was sustained in consequence of a maritime tort.

Under the doctrine of the *Leathers* case extending the admiralty law to invitees in the case of a maritime tort, and under the admiralty law as later developed to apply to a common law action as shown in the case of *Chelentis* vs. *Luckenbach, etc., Co.*, the *Port of New York Stevedoring Company* vs. *Castagna*, and in the case of *Carlisle Packing Co.* vs. *Sandanger*, supra, the admiralty rule of contributory negligence would and should have been applied in the petitioner's case.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers so that there may be a clear and an unambiguous decision as to the right to recover at law for a maritime tort irrespective of contributory negligence, further, in order that there may be a clear decision as to at just what point in the master and servant relationship between the seaman and shipowner, the legal status of seaman arises, and, lastly, that this Court may clearly decide the right of the petitioner as an invitee or licensee, if not a seaman, to have the benefit of the admiralty rule of contributory negligence in an action at law to

recover for a maritime tort, and that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals of the Second Circuit, and finally reverse it.

Respectfully submitted,

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 220 5

JOHN JOHNSON,

Petitioner,

—against—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Respondent.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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JOHN JOHNSON,

Petitioner,

—against—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Respondent.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Decision of the Lower Court.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation,* 24 F. (2nd) 963, and is copied in the record herein at page 184.

Statement of Case.

This is an action at common law, first brought in the Supreme Court of the State of New York (R., 2) to recover for personal injuries sustained by John Johnson, the petitioner. At the time the injuries were sustained, Johnson was walking up a gangplank which was insecurely and improperly rigged on the respondent's vessel, the SS. "Jacksonville". The action was removed to the United States District Court for the Eastern District of

New York (R., 4), and a trial was had with a jury in that Court. The trial Judge instructed the jury that if the plaintiff was guilty of contributory negligence, then he could not recover. This charge was the subject of an appeal to the Circuit Court of Appeals for the Second Circuit and to this Court.

Johnson is a merchant seaman by vocation, he having followed the sea since 1889 (R., 24), and having shipped for a number of years as boatswain on merchant vessels. Johnson had gone on board the SS. "Jacksonville" at the request of the boatswain of the vessel and in his company, in order to sign on as a carpenter or handy-man (R., 9).

On the day of the accident, October 1, 1920, the SS. "Jacksonville" was lying in navigable waters of the United States, in the harbor of Jacksonville, Florida, alongside the SS. "West Compo" with one gangplank stretched between SS. "West Compo" and the SS. "Jacksonville" and another gangplank stretched between the SS. "West Compo" and the dock (R., 9, 10, 105, 106).

On the same day, October 1, 1920, Johnson was at his hotel in Jacksonville, temporarily out of work, when the boatswain of the SS. "Jacksonville" came to his room at the hotel and told him that a man was wanted on board his ship, the SS. "Jacksonville" as a carpenter or handy-man, and asked Johnson to go with him to the ship about four miles away (R., 33) with respect to signing on (R., 9). The direct testimony of Johnson on this point was (R., 9):

> "The boatswain of the "Jacksonville" came to the room where I was laying down and asked me to go down and see the chief officer, there was a

man wanted on board, a carpenter or handy-man. I should go down and I would see him in the evening. He expected him on board. I went down with him, he paid my fare down on the car, passed the gate at the Shipping Board yard, two watchmen were just relieving one another at 6 o'clock, and one stayed a little over and the boatswain asked him if we could pass through. He answered yes. He asked what I wanted to go aboard for. He told him to see the chief officer for to get a job; he wanted a man in the morning."

The ship's watchman on the wharf allowed Johnson and the boatswain to pass over the pier. They went on board the SS. "Jacksonville", crossing over the deck of the SS. "West Compo", which lay between the SS. "Jacksonville" and the dock, and crossing the gangplank from the SS. "West Compo" to the SS. "Jacksonville" (R., 9).

After waiting on board a short time for the ship's officer, who was ashore, the petitioner started to return to the hotel, where his working clothes were, with a view of returning with his clothes the next day (R., 11, 12).

The gangplank between the SS. "Jacksonville" and the SS. "West Compo" was on a steep slant, downward toward the SS. "Jacksonville", and upward toward the SS. "West Compo", so that as petitioner started to return to the shore, he climbed upward on this gangplank (R., 10). The gangplank was insecure and moved to one side when he got about half way upward from the SS. "Jacksonville's" deck. He was caused to lose his balance and fall. As he fell he caught his arm around a steel stanchion, to which he held until his arm broke, whereupon he fell between the vessels (R., 12). As a result of the fall petitioner sustained besides a broken arm, lacerations of the skull, scalp wounds, several

broken bones, broken jaw bones, injuries to the kneecap and shoulder blades (R., 12, 13, 18, 19, 21, 62, 63, 64).

The gangplank was but a makeshift gangplank suspended between two vessels, and on the SS. "Jacksonville's" end, was supported and steadied by only one rope on one side of the plank suspended from a smokestack guy (R., 36, 10, 49). The description of this gangway as given by Johnson upon cross examination was as follows (R., 36):

> "Q. In other words, your testimony is, the only thing that held steady the 'Jacksonville' end of the gangplank was a sling which was tied to a davit? A. Not to a davit, to the smokestack guy. The davit was hanging loose. It might have been tied there before. It was turned around to the gangway and nothing on it whatsoever.
>
> Q. So there was a stay from the smokestack? A. Yes, sir.
>
> Q. And this rope was tied on to that? A. Yes, sir.
>
> Q. And that loop came around the lower end of the gangplank? A. Yes.
>
> Q. And that is the way in which it held? A. That is the way I seen it.
>
> Q. That is the way it was then if you saw it that way, wasn't it? A. Yes, sir."

The deck of the SS. "Jacksonville" at this point was a canvas-covered deck, and merely to protect the canvas (R., 149), the makeshift gangplank had been rigged up so that at the SS. "Jacksonville's" end it rested on a box instead of upon the deck (R., 149, 26, 44, 10). The presence of only one line from the smokestack guy on the one side of the gangplank left it wholly insecure.

Even one of defendant's witnesses described it as "a fool-rigged gangway" (R., 158). As the gangway was about 12 feet long, and the SS. "West Compo" 8 to 10 feet higher in the water than the SS. "Jacksonville" (R., 10, 35), the angle of the makeshift gangway rendered it even more insecure when climbing upward upon it.

With respect to the petitioner's failure to observe the insecure fastening of the gangplank, the Court charged (R., 170, 171):

> "If he could see it and thought it was improperly swung and if he was cognizant of the requirement, then it is for you to say whether or not in using that and continuing to go on it he himself was guilty of contributory negligence and contributed to the happening of this accident. If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such neglect on his part that it contributed to the accident.
>
> If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such negligence on his part that it contributed to the accident. If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant."

On exception and request by counsel the Court further charged (R., 178):

> "Mr. Axtel: Exception. I ask your Honor to charge the jury the rules on the question of contributory negligence as to this maritime law.

The Court: I decline. The action does not lie in admiralty and was not so brought.
Mr. Axtell: Exception."

On request by petitioner's counsel to charge that if the jury found that the watchmen on the pier permitted plaintiff to pass and get on board the ship that petitioner was "not a trespasser at least", the Court further charged the jury as follows (R., 178):

"The Court: He was a licensee on a vessel. I decline to charge that, * * * etc."

The jury was out from 6:05 P. M. to 9 P. M. and returned with a verdict for the defendant. A motion made by petitioner's counsel to set aside the verdict was denied with exception. Judgment was entered for the defendant (R., 178).

Petitioner thereupon duly procured a writ of error to take the case before the Circuit Court of Appeals for the Second Circuit and filed a bill of exceptions together with two assignments of error, as follows (R., 181):

"That the verdict of the jury was contrary to the weight of evidence, and that the Court erred in denying plaintiff's motion to set the verdict aside.

That the trial Court erred in charging the jury as follows: 'If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant.'"

The Circuit Court of Appeals ruled herein as follows (R., 184):

"The plaintiff-in-error assigns error for the charge of the Court, which instructed the jury

that if the plaintiff-in-error was guilty of contributory negligence he could not recover. The plaintiff-in-error now argues that this was a maritime tort, and that the maritime law controls, and, therefore, the contributory negligence was not an absolute bar to a recovery. We think the Court correctly instructed the jury under the authority of *Belden* v. *Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218; *Atley* v. *Packet Co.*, 21 Wall. 389, 22 L. Ed. 619, and *Maleeny* v. *Standard Shipbuilding Co.*, 237 N. Y. 250, 142 N. E. 602. We have not overlooked the *Castagna* case (C. C. A.), 280 F. 618, where, in a dictum, it was inadvertently stated the rule is different than stated in *Belden* v. *Chase, supra.*

Judgment affirmed, with costs."

The foregoing *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit, rendered March 19, 1928, was made the basis of a decree of that Court rendered and entered the 26th day of March, 1928 (R., 185), to review which an application for a writ of certiorari was made (R., 186).

Specification of Errors.

1. That the trial Court erred in charging the jury as follows:

> "If he was guilty of contributory negligence, then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant."

2. The lower Court erred in holding that the trial Court correctly instructed the jury that if the petitioner was guilty of contributory negligence he could not recover.

Argument.

Summary of Argument.

The points upon which the petitioner relies in support of the writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit are briefly summarized as follows:

POINT I.—The point contended for has been decided by this Court in the case of *Chelentis* v. *Luckenbach Steamship Company,* 247 U. S. 372, 384 (1917).

POINT II.—The denial of the ruling requested as to the maritime rule of contributory negligence was in contravention to the principle of the exclusive jurisdiction of the maritime law with respect to the substantive law of maritime torts.

POINT III.—The trial Court, though proceeding at common law, could and should have proceeded upon the principles of justice and equity of the admiralty jurisdiction in charging the comparative negligence rule as it obtains in admiralty.

POINT IV.—The cases upon which the Circuit Court of Appeals affirmed the ruling of the trial court do not support that ruling.

CONCLUSION.

POINT I.

The point contended for has been decided by this Court in the case of *Chelentis* v. *Luckenbach Steamship Company*, 247 U. S. 372, 384 (1917).

This Court has frequently announced in clear and unambiguous words the principle that the rights of a suitor who goes into a common law court for vindication of his wrongs suffered through a maritime tort are those recognized by the maritime law and not those usually enforced by the common law.

Chelentis v. *Luckenbach SS. Co.*, 247 U. S. 372, 384 (1917);
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149, 159 (1919);
Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255, 259 (1922);
Robins Dry Dock v. *Dahl*, 266 U. S. 459, 457 (1924).

In what may properly be called the *Chelentis* rule, this Court gave the first authoritative announcement of the principle above stated in the following words:

> "Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

Chelentis was employed upon a steamship as a fireman, and lost a leg in consequence of endeavoring to perform an improvident order of his superior officer. He brought an action at law in a state court to recover damages, and the action was removed to the United States District Court because of diverse citizenship. Under the maritime law, a seaman was entitled to recover only for maintenance and cure and wages. He claimed, however, to be entitled by the law of the State of New York to recover the full common law indemnity. The Supreme Court held that the liability which existed under the maritime law was not subject to be enlarged to the full common law indemnity of the State.

The rule of the *Chelentis* case as stated above was quoted and relied upon in the later case of the *Knickerbocker Ice Company,* where, at page 159, the Court cited the quotation given above, and further stated:

> "Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law."

In the *Carlisle Packing Company* case, the Court cites the *Chelentis* and *Knickerbocker* cases, and states the rule still more emphatically at page 259 as follows:

> "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court."

Sandanger had brought an action at common law to recover for injuries received when a can ordinarily

containing coal oil and which had been filled with gasoline, exploded when he used it. The Court had not instructed the jury with respect to the maritime rules of indemnity as being limited to maintenance and cure, but as it was found that the charge of unseaworthiness could have been given and that the full measure of indemnity would follow in the event the vessel should be found to be unseaworthy the verdict and judgment was not disturbed.

In the case of *Robins Dry Dock* v. *Dahl,* above cited, this court held that the measure of the plaintiff's negligence could not be limited by a State statute, Section 18 of the New York Labor Law, by means of a charge to the jury with respect to plaintiff's negligence. The Court cited the *Chelentis* case, and stated:

> "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

The holding of the Supreme Court in the *Chelentis* case has been followed by the majority of the courts in the States in passing upon the point now contended for, it being held in the majority of instances chiefly upon the authority of the *Chelentis* case that in cases of maritime tort contributory negligence is not an absolute bar to recovery.

> *J. H. Burton & Sons* v. *May,* 212 Ala., 435, 1925 A. M. C. 707 (Sup. Ct. Ala. 1925);
> *McPherson* v. *Twin Harbor S. & T. Co.,* 1926 A. M. C., 1030 (Sup. Ct. Washington, 1926);
> *Joyce* v. *Convoy S. S. Co.,* 1 F. (2d) 482 (D. C. Maine 1924).

The Supreme Court of Alabama in the *J. H. Burton & Sons Co.* case, *supra,* an action at law, decided in favor of the ruling contended for by the petitioner. This Court recognized the existing authority of *Belden* v. *Chase,* but boldly made its decision under the authority of this Court as announced in the later cases of *Chelentis* v. *Luckenbach* and *Carlisle Packing Co.* v. *Sandanger, supra.* The Court stated:

> "A claim in a state court in an action for a maritime tort committed upon navigable waters and within the admiralty jurisdiction of a right under the Federal statute presents a Federal question, and that jurisdiction cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common-law remedy in a state court. On the authority of *Atlee* v. *Northwestern Union Packet Co.,* 88 U. S. (Wall.), 389, 22 L. Ed. 619, it was held that, if both vessels are culpable in respect of operating, etc., neither can recover damages for injuries so caused. *Belden* v. *Chase,* 150 U. S. 674, 14 S. Ct., 264, 37 L. Ed., 1218. *However, by the later cases it has been held by the Supreme Court of the United States that the general rules of maritime law apply to suites for maritime torts brought in the common-law courts of the United States. Carlisle Pack. Co.* v. *Ole Sandanger,* 259 U. S. 255, 42 S. Ct., 475, 66 L. Ed., 927; *Chelentis* v. *Luckenbach, etc., Co.,* 247 U. S. 372, 38 S. Ct., 501, 62 L. Ed., 1171; *Knickerbocker, etc. Co.* v. *Stewart,* 253 U. S. 149, 40 S. Ct., 438, 64 L. Ed., 834, 11 A. L. R., 1145; *South. Pac. Co.* v. *Jensen,* 244 U. S. 205, 37 S. Ct., 524, 61 L. Ed., 1086, L. R. A., 1918C, 451, Ann. Cas., 1917E, 1900; and that every species of tort, however occurring and whether on board a vessel or not, if upon the high

seas or navigable waters, is of admiralty cognizance (*Atlantic Trans. Co.* v. *Imbrovek,* 234 U. S. 52, 32 S. Ct., 835, 56 L. Ed., 1263, 58 L. Ed., 1208, 1912, s. c., 51 L. R. A. [N. S.], 1157, note), or is of common-law cognizance within the jurisdiction saved 'to suitors in all cases (where) the right of a common-law remedy (exists) when the common-law is competent to give it.' *South. Pac. Co.* v. *Jensen,* 244 U. S. 205, 37 S. Ct., 524, 61 L. Ed., 1086, 1099, L. R. A., 1918C, 451, Ann. Cas., 1917E, 900; *Steamer Max Morris* v. *Curry,* 137 U. S. 1, 11 S. Ct., 29, 34 L. Ed., 586, 589." (Italics ours.)

The Federal District Court of Maine in substance decided the principle of law as contended for by the petitioner by holding that in an action brought to recover for a maritime tort under a death statute of Maine, contributory negligence must be determined not under the common law, but under the maritime law. This Court said in the *Joyce* case, *supra*:

> "It is clearly my duty to follow the law laid down by the Supreme Court in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 215, 37 Sup. Ct., 524, 61 L. Ed., 1086, L. R. A. 1918C, 451 Ann. Cas., 1917E, 900, *supra.* It is not for me to determine the duty of a state court; *but I think a state court in case of a maritime tort should also be controlled by the same maritime rule laid down by the Supreme Court of the United States, and that it should not follow the common-law rule of procedure which it would follow in a case not maritime in its nature,* * * *." (Italics ours.)

In the *McPherson* case, *supra,* the Supreme Court of Washington sustained a verdict for the plaintiff and

held, on page 1034, that the common-law rule of contributory negligence that was charged was not correct, but that there was no reversible error inasmuch as the verdict would have been for the appellant even though the jury had found contributory negligence. The headnote to this case is wrongly edited.

Irrespective of the question as to whether Johnson may be held to have established a contractual relation with the SS. "Jacksonville", sufficient to entitle him to the ruling of contributory negligence to which he would be entitled as a "seaman" under the *Jones Act,* there can be no question but that the tort, happening upon navigable waters, was maritime, and that even as a bare invitee, Johnson had the right under the maritime law to an indemnity against the owners of the ship for their negligence in providing the improper and unsafe gangplank. These rights, sanctioned as they were by the maritime law, require an application of the maritime rule of contributory negligence.

Atlantic Transport Co. v. *Imbrovek,* 234 U. S. 52 (1913);

Leathers v. *Blessing,* 105 U. S. 626, 629 (1881);

Anderson v. *The E. B. Ward, Jr.,* 38 Fed. 44 (1889).

In the *Atlantic Transport Company* case, a stevedore had a recovery in a libel action brought against both the owner of the ship and the stevedoring company for injuries which he received when some hatch covers had fallen upon him while he was loading copper on the ship while it was in the port of Baltimore. It was contended

that there was no jurisdiction for the recovery, but this Court, in an opinion by *Hughes, J.*, said at page 60;

> "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

In the *Leathers* case, the libellant had recovered the sum of $5,707.50 in a libel action *in personam* brought for personal injuries which he received when a bale of cotton, negligently stowed, fell upon him, as he was on his way to the cabin of the vessel, the Steamboat "Natchez". The "Natchez" at the time was lying at the wharf near the foot of Canal Street, City of New Orleans. Blessing was expecting a consignment of cotton and had gone on board to see whether it had arrived. It was shown to be the custom of the officers of the vessel to permit persons expecting a consignment of freight to go on board the vessel to examine the manifest. The Supreme Court affirmed the decree of the lower Court with costs, the Court saying on page 629:

> "This makes the case one of invitation to the libellant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circumstances, the relation of the master and of his co-owner, through him, to the libellant, was such as to create a duty on them to see that the libellant was not injured by the negligence of the master. On the facts found there was a breach of that duty by the negligence of the master, constituting a maritime tort, of which the District

> Court had jurisdiction in this suit. Not only does the jurisdiction of courts of admiralty in matters of tort depend entirely on locality, but since the case of *Waring* v. *Clarke* (5 How. 441, 464), the exception of *infra corpus comitatus* is not allowed to prevail."

Even respondent's witness described the "Jacksonville" as being in navigable waters at the time of the accident, to wit, off Commodore's Point, at Jacksonville, Florida (R., 105) stating that the "Jacksonville" at the time of this accident was in the course of taking on oil (R., 106). It is not disputed that Johnson fell into the water between the two ships, the SS. "Jacksonville" and the SS. "West Compo". It was Johnson's firm conviction that he fell because of the defective rigging on the "Jacksonville" end of the gangplank between the two ships, the gangplank having been swung in a makeshift sling (R., 36) in order to protect the canvas deck (R., 149), a rope on one side of the sling having become untied at the time Johnson stepped upon it (R., 36, 44).

The tort from which Johnson suffered was, therefore, clearly a maritime tort and his rights were thus recognized by the maritime law. Those rights were the same whether he sought to enforce them in admiralty or in a common law court. That is the *Chelentis* rule. It does not depend upon the contract but solely upon the admiralty jurisdiction and the substantive rules of the maritime law.

POINT II.

The denial of the ruling requested as to the maritime rule of contributory negligence was in contravention to the principle of the exclusive jurisdiction of the maritime law with respect to the substantive law of maritime torts.

The charge of contributory negligence in accordance with the rules of the common law that was made in the trial Court was in contravention of the well recognized rule that the jurisdiction of the maritime law as to a maritime tort is exclusive. It was admittedly the common law and not the admiralty rule of damages that was charged by the trial Court, but it was a *substantive* and not a *remedial* rule of law that was charged, and for that reason was not within the terms of the saving clause.

Port of New York Stevedoring Co. v. *Castagna,* 280 Fed. 618, 624 (cert. denied, 258 U. S. 631, 1922);
Kennedy v. *Cunard Steamship Co.,* 197 App. Div. 459, 467 (1st Dept. 1921);
Central Vermont Railway v. *White,* 238 U. S. 507, 512 (1914).

In the case of *Port of New York Stevedoring Co.* v. *Castagna,* an action at law, a longshoreman was precipitated into the hold of the steamer that was in navigable waters of the United States, when a rotten board, of which he had taken hold, broke. There was a question as to whether the condition of the board was so plainly observable that an ordinarily prudent person would have

appreciated the defect. In upholding the right of the plaintiff to recover irrespective of his contributory negligence in a common law action, the Court, Mayer, *J.*, stated the reason to be that the matter was one of right and not of remedy:

> "The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum. In the case at bar, plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common-law court with the same right as he would have entered the admiralty Court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, and this right of plaintiff sprang into existence because he suffered a maritime tort. The trial Judge was peculiarly familiar with the question, for it was he who wrote the opinion in *Carter* v. *Brown, supra,* and our view is that his charge as to contributory negligence was sound."

The case of *Carter* v. *Brown,* to which the opinion in the *Castagna* case refers, is reported at 212 Fed. 293, and is a decision of the Circuit Court of Appeals for the Fifth Circuit, in a libel for personal injuries sustained by a seaman due to improper stowage of cargo. The opinion written by *Grubb, J.,* is a particularly lucid expression of the subject.

In addition to the opinion of Judges *Mayer* and *Grubb,* there is also the opinion of *Page, J.,* of the Appellate Division, First Department, New York, in the case of *Kennedy* v. *Cunard Steamship Company.* In this case

a longshoreman had brought an action at law to recover for injuries received by falling into an open hatchway. An order dismissing the complaint was reversed and a new trial ordered, the Court saying with respect to the law of contributory negligence applicable:

> "The instant case is an action for damage for personal injuries, for which there exists in this State a common-law remedy. Therefore, the action may be brought in our Supreme Court, the rules of practice, pleading and evidence of our courts apply, and the cause will be tried in conformity therewith; but the rules relating to contributory negligence, acts of fellow-servants, and the measure of recovery must be determined by the maritime law and not by the common law.
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> "In maritime law contributory negligence of the injured party does not defeat a recovery but goes to a reduction, or more appropriately, an apportionment of the damage. The general rule of the common law exempting the master from liability for injury to a servant by a fellow-servant is not fully applied by the maritime law. And the rules applicable to the recovery, whether a full indemnity, or wages, maintenance and cure, must be taken into consideration, and the relief given according to the rules of maritime rather than common law."

This Court announced in the case of *Chelentis* v. *Luckenbach Steamship Co.* (*supra*), at page 384:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary."

In *Central Vt. Railway* v. *White* (*supra*), a case arising under the Federal Employees' Liability Act, this Court said:

> "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff."

Although the Court in this instance was concerned only with the rule of the burden of proof of contributory negligence, the reasoning of the Court leading it to the opinion that the rule of the burden of proof is one of substantive law is equally applicable to the rule of contributory negligence.

The rule of contributory negligence applied by the trial Court being a rule of substantive law, and ad-

mittedly of common law, is clearly not within the scope of the saving clause of the pertinent sections of the Judicial Code. Nor may the charge be justified as an exercise of concurrent common law jurisdiction, for the reason that the grant of maritime jurisdiction as defined by the Constitution and defined by the Judicial Code is exclusive of such concurrent jurisdiction. It is only the common law remedy that is saved, not a remedy in a common law court.

Constitution, Art. III, Section 2;
Constitution, Art. I, Sec. 8, Clause 18;
Judicial Code, Sec. 256, Act of September 24, 1789, R. S. 711, U. S. Code Title 28, Sec. 371;
Judicial Code, Sec. 24, Act of September 24, 1789, R. S. 563, U. S. Code, Title 28, Sec. 41;
Martin v. *Hunters Lessee,* 1 Wheaton, 304, 333 (1816);
The Moses Taylor, 71 U. S., 411, 428 (1866);
Hine v. *Trevor,* 71 U. S., 555, 568 (1866);
Southern Pacific Co. v. *Jensen,* 244 U. S., 205 (1916);
Knickerbocker Ice Co. v. *Stewart,* 253 U. S., 149 (1919).

The grant of jurisdiction of the Supreme Court with respect to admiralty matters was stated in *Article III, Section 2,* of the *Constitution* as follows:

"The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties

> made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; *to all Cases of admiralty and maritime Jurisdiction;* to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different states, between citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (Italic ours.)

The construction of the judicial power granted by the *Constitution,* with respect to the exclusive nature of those powers with respect to admiralty matters was made by *Justice Story* in the case of *Martin* v. *Hunters Lessee* (*supra*). The suit involved a mandate of the Supreme Court which the Court of Appeals of Virginia had refused to obey. *Justice Story* said, at page 332:

> "In wht cases (if any) is this judicial power exclusive, or exclusive, at the election of congress? It will be observed, that there are two classes of cases enumerated *in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is

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dropped, seemingly *ex industria*. Here, the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed, that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power, either in an original or appellate form, to *all* cases; and in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the constitution, laws and treaties of the United States. Here, the state courts *could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts, previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect, not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as

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> it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudiciation of which foreign nations are deeply interested; it embraces also maritime torts, contracts and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty."

By *Article I, Section 8, Clause 18,* of the *Constitution,* Congress, it is to be remembered, was given power:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Although the jurisdiction of admiralty matters was not declared by the Constitution to be exclusive it was so declared by Congress in the exercise of the power conferred by Article I, Section 8, Clause 18, of the *Constitution,* by the *Act of September 24, 1789,* which has been embodied in *Sections 256* and *24* of the *Judicial Code. Section 256,* which deals with exclusive jurisdiction, is as follows:

> "*Exclusive jurisdiction of United States courts.* The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter

mentioned, shall be exclusive of the courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Thrd. *Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it* and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls." (Italics ours.)

Section 24 of the *Judicial Code,* which deals with original jurisdiction, is too long to quote entirely, but the pertinent clauses thereof are given as follows:

> *Original jurisdiction.* The district courts shall have original jurisdiction as follows:
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> * * * * * * * *
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> "(3) *Admiralty causes, seizures, and prizes.* Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize. The jurisdiction of the district courts shall not extend to causes arising out of injuries or to death of persons other than the master or members of the crew, for which compensation is provided, by the workmen's compensation law of any State, District, Territory, or possession of the United States.
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> "(20) *Suits against United States.* Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000. * * *
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> "(21) *Suits for unlawful inclosure of public lands.* Twenty-first. Of proceedings in equity, by writ of injunction * * *
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> * * * * * * * * *

"(25) *Partition suits where United States is joint tenant.* Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate."

The contest as to the exclusiveness of the admiralty jurisdiction has in the main been confined to two types of cases. These have been concerned with cases such as the *Moses Taylor,* in which States have attempted to give a lien and a remedy *in rem* with respect to maritime cases. The other cases are the type of *Southern Pacific* v. *Jensen,* and are of comparatively recent origin and are concerned with the attempt of States to give new rights and remedies as to maritime causes of action mainly through workmen's compensation acts. In the *Robbins Dry Dock* case, a State statute was sought to be made the basis of negligence in admiralty. In the *Chelentis* case, a common law theory of damages was sought to be imposed upon an admiralty cause.

The reasoning in these cases which proceeds upon the prohibition of an invasion of the admiralty jurisdiction, is applicable to the present case. The maritime substantive law may not be displaced by the law of the states, statutory law, or the common law.

If the jurisdiction of the maritime law and the common law with respect to maritime torts were intended to be concurrent, it is reasonable to suppose the *Judicial Code* would have so provided, as it did in a somewhat similar circumstance and with respect to claims in the Court of Claims (*Clause 20, Section 24, Judicial Code, supra*).

Neither may a construction of concurrent jurisdiction be entertained as a possible construction and limited in its application to the federal courts. The words "common law remedy" in the saving clause include in their natural meaning both state and federal courts.

The concurrent theory puts the state courts in the position of administering and adjudicating substantive rights arising under the maritime law and this is clearly against the express exclusive language of the *Judicial Code, Sections 24 and 256.*

The Court in *The Moses Taylor* case, on page 431, adopts the reasoning of *Justice Story* in *Martin* v. *Hunters Lessee,* and there states:

> "The case before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it'. It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem,* as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute."

The reasoning of the Court in the case of *The Moses Taylor* is much relied upon by the Court in the *Chelentis* case (*supra*), at page 383.

In the *Moses Taylor* case, a statute of California had provided that steamers, vessels and boats shall be liable, among other things, for non-performance or mal-performance of any contract or transportation of persons or property, and one Hammonds had proceeded against

the vessel in a court of the Justice of the Peace, and had secured a judgment of $200, which judgment the Supreme Court reversed as having been granted without jurisdiction.

In the case of *Southern Pacific Co.* v. *Jensen,* the family of Jensen had an award from the Workmen's Compensation Bureau in New York, Johnson having been accidentally killed in the performance of his duties in unloading the steamship of the respondent, a Kentucky corporation, while the vessel lay at Pier 49 in the Hudson River. The steamship company appealed upon several grounds, among others, that the award was unconstitutional within the meaning of *Article III, Section 2,* of the *Constitution,* conferring admiralty jurisdiction upon the United States. The Court refused to uphold the award or to recognize the jurisdiction of the Workmen's Compensation Act to pass upon the maritime cause of action involved. The Court said:

> "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it'. The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

In the case of *Knickerbocker Ice Co.* v. *Stewart,* previously cited, this Court again had for consideration the validity of an award to the family of a marine worker

who was killed while working as a bargeman on the Hudson River. Between the time of the decision in this case and the decision in the case of *Southern Pacific Co.* v. *Jensen* (*supra*), the saving clause as set forth in *Sections 24 and 256* of the *Judicial Code* had been amended. The amendment was held ineffective, the Court holding that Congress could not delegate its legislative power. This Court reversed the award and after reaffirming the view that the saving clause conferred no substantive rights, stated at page 162, that the saving clause was not changed by the ineffectual attempt of Congress to amend it.

It is clear then from the foregoing authorities that the jurisdiction of the maritime law is exclusive in its substantive features and made so by the Constitution as that grant of power has been further declared and defined in the Judicial Code and that the recent amendments have not operated to lessen this exclusive feature. Being exclusive in its substantive features, it was exclusive of the common law rule of contributory negligence, that was charged by the trial Court in this case.

POINT III.

The trial Court, though proceeding at common law, could and should have proceeded upon the principles of justice and equity of the admiralty jurisdiction in charging the comparative negligence rule as it obtains in admiralty.

The maritime tort suffered by Johnson being without question of maritime jurisdiction, the tort having occurred upon navigable waters of the United States, the trial Court should have acted upon the principles of justice and equity which are characteristic of the maritime law in permitting the rights of Johnson to be governed by the more equitable principles of the maritime law and embodied in the admiralty rule of comparative negligence.

> *Watts* v. *Camors,* 115 U. S. 353, 361 (1885);
> *The Marianna Flora,* 11 Wheaton 54 (1826).

In *Watts* v. *Camors,* the Court considered the equitable nature of the admiralty jurisdiction as follows:

> "In England and in this country, a court of admiralty, within the scope of its powers, acts upon equitable principles; and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief."

In *The Marianna Flora,* a case of prize, *Justice Story* said:

> "The present case stands upon a strong analogy, and to inflict damages would be to desert

> that analogy. Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law."

The confines of the common law procedure were not so strict as to prevent the interposition of the equitable answer of the admiralty rule of contributory negligence to the affirmative defense of contributory negligence set up in the answer. Even before the enactment of the *Equitable Defense Act* it was the practice to allow equitable replies of fraud. A defense of release was allowed to be met by charges of fraud.

Act of March 3, 1915, C. 90, Judicial Code, Section 274B, U. S. Code, Title 28, Section 398;

Wagner v. *Mutual Life Ins. Co.,* 90 Fed. 395 (C. C. A., 6th Cir., 1898);

Whitney Co. v. *Johnson,* 14 F. [2d] 24 (cert. denied 274 U. S. 734, 1926).

The *Equitable Defense Act* states:

> "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plain-

tiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

It could not have been necessary for Johnson to plead the maritime rule of contributory negligence as an equitable reply. That was part and parcel of his cause of action, just as much as his proof of negligence of the respondent. But at least under the New York Civil Practice Act, an affirmative defense is deemed denied without the necessity for the interposition of a formal reply.

Conformity Act, Act of June 1, 1872, R. S. 914, U. S. Code, Title 28, Sec. 24;
New York Civil Practice Act, Sec. 243, Cahill's New York Civil Practice (1928).

The request for the admiralty ruling of contributory negligence did not involve the enforcement of an admiralty procedure which the common law was incompetent to enforce such as a proceeding *in rem* or a limitation proceeding. (*Chisholm* v. *Northern Transportation Co.,* 66 Barb. 363, 1872.) It was merely a request for the Court to enforce as a maritime right that right which it enforces every day with respect to railway employees under the *Federal Employees' Liability Act,* U. S. Code, Title 45, Sec. 53, and with respect to seamen under the *Jones Act,* U. S. Code, Title 46, Sec. 688, in actions at law and before a jury.

POINT IV.

The cases upon which the Circuit Court of Appeals affirmed the ruling of the trial Court do not support that ruling.

Neither of the cases of *Atlee* v. *Packet Steamship Co.*, 88 U. S. 389 (1874), nor *Belden* v. *Chase,* 150 U. S. 674 (1893), are sufficient authority for upholding the ruling of the trial Court that contributory negligence is a bar to a recovery in this action.

Although there are distinctive points about each of these cases, the clear defect in these cases from the standpoint of their weight as authority in the present instance, is that in neither of these cases was the point made as to whether contributory negligence in an action for a maritime tort brought in a common law court was a bar, the main point in issue in the instant case. In both the *Atlee* and *Belden* cases, it appears from the briefs of counsel and from the assignments of error that the point of contributory negligence was not briefed or considered as at issue by counsel and, not having been at issue, the point may not be considered as having been well considered.

In the *Atlee* case, the Union Packet Company had filed a libel against Atlee for the sinking of a barge caused by a collision with a stone pier which Atlee had built on a navigable portion of the Mississippi River. The Circuit Court had found Atlee entirely at fault and decreed whole damage against him. The Supreme Court found contributory negligence against the Packet Company,

and reversed the judgment of the lower Court with a decree for half damages. *Mr. Justice Miller,* it is true, said at page 395, that the plaintiff had a concurrent remedy at law, and that if there were contributory negligence on the part of the plaintiff the plaintiff could not recover in a common law action. No authorities, however, and no reasons were given in support of this view, and as the case involved a libel proceeding this part of the opinion is clearly dicta, and has no force either as precedent or logic in this case.

In the *Belden* case, the plaintiff had secured a verdict for $27,668.28, which the Court of Appeals of New York affirmed without opinion, one judge dissenting with opinion. The defendant's yacht was a coasting vessel and bound to carry central range lights while navigating the Hudson River, and did not have them. The pilot of the plaintiff-in-error on the other hand had decided to pass to the left of the coasting vessel after he had signalled that he would pass to the right. The points argued before the Supreme Court, however, did not include the question as to whether the maritime law of contributory negligence and apportionment of damages was applicable. Both counsel seemed to assume that that point was not involved, for it was not briefed and there is no assignment of error upon that point. The argument of counsel for each of the parties was wholly devoted to the point that their clients were free from blame and that the negligence of the other party was the cause of the collision.

The only other case relied upon by the Circuit Court of Appeals for the Second Circuit, in upholding the trial Court, was that of *Maleeney* v. *Standard Shipbuilding Co.,* 237 N. Y. 250 (1923). This case relied entirely

upon the authority of the two foregoing decisions of *Atlee* v. *Packet Steamship Co.* and *Belden* v. *Chase.* No extended discussions for the reasons for relying upon this authority was entered into in the *Maleeney* case. On page 262 the Court said that the Court should follow the ruling of the United States Supreme Court in the case of *Belden* v. *Chase,* "until that court modifies or limits the authority", evidently not agreeing with that case or with the present state of law as that Court conceived it to be.

These cases give no consideration whatever to the fundamental reasons that have been thoroughly discussed in those other cases concerning the development of the *Chelentis* rule, mentioned *supra.* It would seem, therefore, that these cases have no controlling influence in the consideration of the present case. The view urged by Johnson is the view of the later and well reasoned decisions of this Court in the cases of *Chelentis* v. *Luckenbach SS. Co., Carlisle Packing Co.* v. *Sandanger, Southern Pacific Co.* v. *Jensen, Knickerbocker Ice Co.* v. *Stewart,* and related cases cited *supra.* The *Maleeney* case was clearly made to depend upon the *Belden* case, while the *Belden* case was made to depend upon the *Atlee* case, in which latter case the point was clearly dicta and had nothing to do with the decision. The Court in the present case, therefore, is concerned with a chain of legal error founded upon a misconception, conceived in dicta.

CONCLUSION.

It is respectfully submitted that the rulings of the Circuit Court of Appeals for the Second Circuit and of the trial Court in holding that the plaintiff who had been invited on board the SS. "Jacksonville" with respect to signing on as a carpenter or handy-man, was barred from recovery for the maritime tort which he suffered, in the event that the jury should find that his negligence contributed to the injury, are in error and opposed to the most recent decisions of this Court, chiefly that of the Chelentis case and are decisions that if allowed to stand, will be harmful to the proper application and understanding of the maritime law of the United States, and that this Court should reverse the decision of the lower Court and direct a new trial be had in this action.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 5.

JOHN JOHNSON,
Petitioner,

—against—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
Respondent.

No. 32.

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC.,
Petitioners,

—against—

BENJAMIN LUSTGARTEN, an infant, by his guardian *ad litem*, JOHN A. LYDECKER,
Respondent.

BRIEF ON BEHALF OF JOHN JOHNSON AND BENJAMIN LUSTGARTEN.

SILAS B. AXTELL,
Attorney for Petitioner, Johnson and Respondent, Lustgarten.

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Supreme Court of the United States.

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Respondent.

BRIEF ON BEHALF OF JOHN JOHNSON AND BENJAMIN LUSTGARTEN.

The Order of This Court Made With Respect to the Argument of Defenses of Fleet Corporation.

Following the argument of the *Johnson* case on February 21, 1929, during the argument of which references were made to the then pending petition for certiorari in the Supreme Court in the *Lustgarten* case, this Court on

April 8, 1929, made the following order, reported in the *U. S. Supreme Court Journal,* 1929, page 234, and *American Maritime cases,* No. 4, April, 1929, cover page:

> "No. 220. John Johnson, petitioner, vs. The United States Shipping Board Emergency Fleet Corporation, 1928 A. M. C. 987, certiorari granted, Oct. 8, 1928. This cause is restored to the docket for reargument and is set down for hearing with No. 676, United States Shipping Board Emergency Fleet Corporation vs. Lustgarten, the two cases to be argued as one. The Court especially invites argument on the following questions:
>
> 1. Is the United States Shipping Board Merchant Fleet Corporation, as an agency of the United States, immune from suit for the tortious acts of persons whom it has employed to carry on the operation of merchant vessels of the United States, and who have been selected by it with due care?
>
> 2. Are the remedies given against the United States Shipping Board Emergency Fleet Corporation by the Suits in Admiralty Act of March 9, 1920, exclusive of all other remedies, whether at law or in admiralty, for liabilities of the Fleet Corporation growing out of the operation of merchant vessels of the United States?
>
> 3. Is the two-year period of limitation prescribed in the Suits in Admiralty Act applicable to the present suit?"

Decisions of Lower Courts.

The opinion of the Circuit Court of Appeals for the Second Circuit in case No. 5, is reported in *Johnson* v.

United States Shipping Board Emergency Fleet Corporation, 24 F. (2d) 963 (1928), and is copied in the record of this case as filed in this Court, at page 184. This opinion states nothing with reference to the three defenses upon which argument has been requested, largely because neither in the briefs nor in the oral argument in the Circuit Court of Appeals was any reference made by the attorneys for the Fleet Corporation to these defenses.

The opinion of the Circuit Court of Appeals for the Second Circuit, in case No. 32, is reported in *Benjamin Lustgarten, an infant, his guardian ad litem, John A. Lydecker, defendant-in-error (plaintiff below) v. United States Shipping Board Emergency Fleet Corporation*, and *Consolidated Navigation Company, Inc.*, plaintiffs-in-error (defendants below), 28 F. (2nd) 1014 (1928), and is copied in the record of this case as filed in this Court, on page 188. The first, but not the second or third defenses above mentioned, was the subject of a pointed argument in this case; the Court, Judges Manton, Swan and Augustus N. Hand sitting, denied such defense and affirmed the judgment below in a per curiam opinion.

Jurisdiction of the Court.

The judgment of the Circuit Court of Appeals, reviewed in the *Johnson* case, No. 5, was entered March 26, 1928 (R. 185). A petition for certiorari was filed on June 22, 1928, and an order allowing certiorari was entered October 3, 1928.

The judgment of the Circuit Court of Appeals to be reviewed in the *Lustgarten* case, No. 32, was entered November 5, 1928 (R. 356). A petition for certiorari was filed February 28, 1929, and an order allowing certiorari was entered March 5, 1929 (R. 189).

The Questions Presented.

JOHNSON CASE.

With respect to the *Johnson* case, this brief will discuss all three questions upon which the Court has invited argument, together with the *Lustgarten* case.

The question upon which the writ of certiorari was sought in the *Johnson* case, to wit, whether in a suit at law for a maritime tort, contributory negligence is a bar to a recovery, we understand from the order of the court, made April 8, 1929, was decided in favor of the petitioner, Johnson, and we therefore rest this question upon the argument contained in our brief in support of the writ of certiorari, and filed in February prior to the argument of this case, and do not reprint here our argument upon that question or the specification of error which it covered.

With respect to the argument of these three questions as they apply to the *Johnson* case, we do not wish to be considered as abandoning our objection made upon the previous argument of the *Johnson* case in this Court on February 21, 1929, to the effect that these objections were not properly before the Court and had been waived, and we shall therefore include an additional point which will consider our objections to the assertion of these defenses.

LUSTGARTEN CASE.

We shall consider the first two of the questions stated by the Court, as applying to the *Lustgarten* case, together with the *Johnson* case.

We do not wish to be considered as conceding that

the second of these questions, to wit, that of exclusive jurisdiction under the Suits in Admiralty Act, is properly before the Court.

This case having been begun within the two-year limit, is not directly concerned with the third defense.

We shall consider our objections to the assertion here of the defense presented in the second question stated by the Court, with our objections to the assertion of the first defense together with the *Johnson* case.

In addition to the three questions stated by the Court, and the question as to whether certain of the defenses are properly before the Court, we shall also consider as part of the first question the question presented in Specification of Error No. 2, as involving the question of ownership *pro hac vice* and consequent liability on the part of both the Fleet Corporation and the Consolidated Navigation Company, Inc.

We shall not argue the questions presented in the Specification of Errors in the *Lustgarten* case, Numbers 1 and 4, because no argument was made upon these points in the brief in support of the writ of certiorari. We do not concede that the questions presented in the Specification of Errors Numbers 1 and 4 are properly before the Court, and believe that they are not worthy of argument anyway.

Statements of the Cases.

JOHNSON CASE.

The *Johnson* case is an action for personal injuries brought at common law in the Supreme Court of New York (R. 2), and removed because of a diversity of citizenship to the United States District Court for the Eastern District of New York (R. 4). Johnson states that he was asked by the boatswain of the SS. "Jackson-

ville" to go on board the SS. "Jacksonville," which was in the harbor of Jacksonville, Florida, taking oil (R. 106) to see the ship's officer with respect to signing on as a carpenter or handyman (R. 33).

Johnson failed to find the ship's officer on the boat (R. 11 and 12) and started to return to his hotel, crossing the gangplank between the SS. "Jacksonville" and the SS. "West Compo", which latter vessel was between the SS. "Jacksonville" and the dock (R. 9 and 10), when the gangplank swung to one side, pitching Johnson into the narrow water space between the two ships (R. 12) from which Johnson sustained numerous and serious injuries (R. 12, 13, 18, 19, 21, 62, 63, 64). Johnson stated that the gangplank was insecurely fastened; that one end of the rope-swing which held the gangplank steady had come untied (R. 36).

There was a question of Johnson's contributory negligence in using the gangplank, and the Court charged that if he was guilty of contributory negligence, that then he could not recover (R. 170, 171). Exception was taken upon the refusal to charge the Admiralty Rule of contributory negligence (178). The injury occurred August 1, 1920. A complaint was served March 29, 1923 (R. 2). The jury brought in a verdict for the defendant (178), which was affirmed (R. 184). Johnson asks for a new trial.

Lustgarten Case.

The *Lustgarten* case was brought at common law in the United States District Court for the Southern District of New York (R. 2) and is also an action for personal injuries. The appeal arises out of the second cause of action, alleging negligence in failure to supply

proper medical attention, the first cause of action having been dismissed (R. 13). Lustgarten, an infant, against his will, was compelled by the master of the ship, SS. "Coelleda" to work in the cook's galley of the SS. "Coelleda" while the ship was on the high seas, the morning following the receipt of injuries (R. 31) sustained while attempting to empty over the ship's rail a heavy can of steaming ashes (R. 74, 29, 80, 153) during a storm (R. 81, 89). At this time the ship was proceeding from Swansea, Wales, loaded with coal (R. 19). Lustgarten worked for two hours and then suffered a hemorrhage (R. 32, 37, 176). One month after receiving the injury he was found to be in a pre-tubercular condition which had proceeded to an advanced stage of tuberculosis at the time of trial (R. 122, 128). At the close of plaintiff's case, defendant's counsel moved for a dismissal upon the ground that both the Fleet Corporation and the Consolidated Navigation Company, Inc. were agents of the United States. These motions were denied with exceptions (R. 142, 143, 169). At the close of the entire case defendant's counsel moved to dismiss upon the ground of failure to establish a cause of action. This motion was denied with exception (R. 170). The jury brought in a verdict for the plaintiff in the sum of $10,000 (R, 175) which was affirmed (R. 188).

Summary of the Argument.

POINT ONE.

THERE IS NO IMMUNITY FROM SUIT ON THE PART OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, EVEN CONSIDERED AS AN AGENT OF THE UNITED STATES, FOR THE TORTIOUS ACTS OF PERSONS WHOM IT HAS EMPLOYED TO CARRY ON THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND WHO HAVE BEEN SELECTED BY IT WITH DUE CARE.

I.—The acts of Congress show that there was an unmistakable intention on the part of Congress to subject the Fleet Corporation to the same laws, regulations and liabilities as private business corporations engaged in the same line of business.

II.—Even in the absence of what we regard as an express recognition on the part of Congress of the proprietary character of the business of merchant shipping the Fleet Corporation was expected to undertake, and the liabilities resulting therefrom, it would follow as a matter of law that the operation of this merchant fleet was a proprietary, rather than a governmental function. This merchant shipping business of the Fleet Corporation has been judicially recognized to be inherently of this character.

III.—There is really nothing in this question which has not been decided. We have chosen to meet the Government on its own ground of defense, based upon the nature of the work in which the Fleet Corporation is engaged because we are con-

fident of the fundamental error of this defense, but it is really *stare decisis.*

IV.—By the managing operating agreement, the Fleet Corporation made itself and the persons to whom it chartered the steamships, "Jacksonville" and "Coelleda", liable as owners *pro hac vice* for torts occurring in the operation of vessels, as the owner. The business upon which the Fleet Corporation was acting was its own business, and not the business of the United States.

V.—The Fleet Corporation is very particular to draw attention to the fact that the name of the United States is signed to the operating agreement. What the Fleet Corporation does not do is to show its authority for so signing the name of the United States to this agreement.

POINT TWO.

IT IS NOT AN EXCLUSIVE REMEDY THAT IS GIVEN AGAINST THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION BY THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1929, FOR LIABILITY OF THE FLEET CORPORATION GROWING OUT OF THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND DOES NOT BAR THE COMMON LAW ACTIONS INSTITUTED IN THESE TWO SUITS.

I.—The Suits in Admiralty Act should be construed in harmony with the later act of June 5, 1920, the Merchant Marine Act, and so as to sustain the present common law actions *in personam* brought against the Fleet Corporation.

II.—The right to sue the Fleet Corporation at common law with the right of trial by jury, has

been saved to the present plaintiffs by the Saving Clause in the Judiciary Act and by the *Seventh Amendment* to the *Constitution* and such a construction of the Suits in Admiralty Act which would render it unconstitutional *or even create a doubt of its unconstitutionality,* should be avoided.

III.—In the cases in which this Court has had occasion to construe the Suits in Admiralty Act, there has not been presented the point now in issue, as to whether apart from the Suits in Admiralty Act and at common law, the Fleet Corporation may be sued for its maritime torts, *nor has there been presented the question as to what has been the effect upon this Act of Section 18 of the later Merchant Marine Act.*

IV.—"The complete system of administration," although possibly a valid argument for the uniformity of the Admiralty remedy and administration provided for in the Suits in Admiralty Act, is, we submit, no argument in favor of a deprivation of a previously existing action at common law.

V.—Construed as depriving the present plaintiffs of their common right to bring a common law action for a maritime tort against the Fleet Corporation, the act should be strictly construed with reference to a deprivation of the plaintiff's present common right, and no meaning should be given to it not within its express words.

VI.—The maintenance of the present actions does not conflict with the terms of the Suits in Admiralty

Act. The plaintiffs have not asked for process against the vessels of either the United States or the Fleet Corporation.

VII.—In view of the organization of the Fleet Corporation as a private corporation with proprietary duties to perform, and its consequent liability as explained in Point One, it is not to be presumed that the only remedy by which such liabilities may be adjusted is a libel *in personam*, under the Suits in Admiralty Act. No other private corporation in the same line of business would be so restricted.

POINT THREE.

THE TWO YEAR PERIOD OF LIMITATIONS PRESCRIBED IN THE SUITS IN ADMIRALTY ACT IS NOT APPLICABLE TO THE LAW ACTION IN THE JOHNSON CASE.

I.—Assuming that the Suits in Admiralty Act is not exclusive of the common law remedy saved to suitors under the Judiciary Act, the two-year period of limitation by its express terms would not be applicable to the Johnson action.

II.—The lower court of common law in trying the action which Johnson had brought under the Saving Clause, and at common law, was required to apply only the substantive and not the procedural maritime law. The two-year period of limitations was procedural and not substantive maritime law.

POINT FOUR.

NONE OF THE DEFENSES WITH RESPECT TO THE JOHNSON CASE NOR THE DEFENSE OF THE EXCLUSIVENESS OF THE REMEDY UNDER THE SUITS IN ADMIRALTY ACT AS IT APPLIES TO THE LUSTGARTEN CASE, IS PROPERLY BEFORE THIS COURT FOR ARGUMENT.

I.—Counsel for the Fleet Corporation themselves seemed to have regarded these three defenses as of no importance in the lower courts and thus we have an almost complete lack of proof in this court upon which to base an intelligent discussion. The court is limited by the record.

II.—No motions and no request to charge and no exceptions to rulings were made with respect to these defenses.

POINT ONE.

THERE IS NO IMMUNITY FROM SUIT ON THE PART OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, EVEN CONSIDERED AS AN AGENT OF THE UNITED STATES, FOR THE TORTIOUS ACTS OF PERSONS WHOM IT HAS EMPLOYED TO CARRY ON THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND WHO HAVE BEEN SELECTED BY IT WITH DUE CARE.

I. The acts of Congress relating to the conduct of the Merchant Fleet enterprise show that there was an unmistakable intention on the part of Congress to subject the Fleet Corporation to the same laws, regulations and liabilities as private business corporations engaged in the same line of business.

When Congress, in 1916, found it necessary to provide for the acquisition by the Government of a large fleet of merchant vessels, it adopted a definite policy to which it has firmly adhered. It authorized the Government to carry on their activities through a business stock corporation, providing that the Shipping Board, on behalf of the United States, might subscribe to all or a majority of the stock of such corporation, and that with the approval of the president it might sell any or all of the stock provided that it should never be a minority stockholder. "It contemplated private persons as stockholders," [*Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549, 565 (1922)], which signifies that it also contemplated the conduct of such business for profit and the distribution of profits among the stockholders.

The formation of such a stock corporation was authorized by the Shipping Act, 1916, to be made under the

laws of the District of Columbia. Pursuant thereto, the United States Shipping Board Emergency Fleet Corporation was so organized as a business corporation with a capital stock of $50,000,000. The charter thereof stated: "the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of such business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia, upon corporations under said sub-chapter four of the corporation laws of the District of Columbia." [Appendix, p. 1].

The fact that the stock was entirely subscribed by the United States did not alter its character, for it was contemplated that the stock might be sold to private persons. This was the instrumentality selected by the Government because it was recognized that the business to be conducted was a vast commercial enterprise.

One of the powers of the corporation under the laws of the District of Columbia was the "capacity to sue and be sued." [*Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549, 565 (1922)].

The Fleet Corporation under this act has been operated as a strictly business corporation, its financial transactions being carried on strictly in accordance with commercial practice, rather than as a governmental unit. [*Skinner & Eddy* v. *McCarl,* 275 U. S. 1, 7 (1927)].

If the enterprise were required to be carried out by the instrumentality of such a corporation, it would seem-

ingly have been unnecessary to make further provision to indicate that the operation of the merchant fleet should be subject to the same liabilities as the operation of similar vessels by private persons. [*Sloan Shipyards* v. *Fleet Corporation, (supra,* page 570)]. But the Shipping Board was not required by the Act to use such a corporation and Congress desired to leave no doubt that, no matter how such enterprise was conducted, the same rules should apply with respect to the operation of such vessels and, therefore, specifically provided that the vessels to be operated, whether owned by the United States or not, should be "subject to all the laws, regulations and liabilities of merchant vessels". [*Section 9, Shipping Act, 1916, U. S. Code, Title 46, Sec. 808*].

Thus it was made clear that the ships so operated by the Fleet Corporation were subject to all such liabilities, and subsequently it was found that the ships of the merchant fleet were being arrested and seized, and that there was no speedy remedy for their release. No special provision had been made for the furnishing of bonds for the release of such ships. [*House Report,* No. 223, Appendix p. 8; *Remarks of Senator Jones,* Appendix, p. 10; *The Lake Monroe,* 250 U. S. 246, (1919)].

To avoid this embarrassment and the consequent delay and expense, Congress then passed the Suits in Admiralty Act, exempting such ships from arrest and seizure, and authorizing in lieu thereof a suit in admiralty directly against the United States or against the corporation by libel in personam, whenever, if any such vessel was privately owned or operated, or the cargo thereof privately owned or possessed, a proceeding in admiralty might have been maintained. [Section 2 of the Act].

After the War, Congress abandoned the purpose of selling stock in the Fleet Corporation and instead determined that it should, as soon as possible without loss, dispose of the ships of the Emergency Fleet, and passed the Merchant Marine Act in 1920. [Section 5]. Provision was made that the steamship lines theretofore established should be maintained "until in the opinion of the Board, the maintenance thereof is unbusinesslike and against the public interest". [Section 9]. While the Act directed the transfer of a title to the ships to the United States, nevertheless, it provided that their operation and sale should be conducted by the Shipping Board or the Fleet Corporation. The charter of the Fleet Corporation remained unchanged, the first change being made in 1927 when merely the name was changed to United States Shipping Board Merchant Fleet Corporation. [*U. S. Code, Title 46, Section 810a*].

Notwithstanding the passage of the Suits in Admiralty Act approved March 9, 1920, it seems that Congress desired to give further assurance to persons dealing with the Fleet Corporation, that all such persons should have the same protection as if dealing with a private person operating merchant ships, and reenacted the provisions of Section 9 of the Shipping Act of 1916, that "such vessels, while employed solely as merchant vessels, shall be subject to all the laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner in whole or in part, or hold any mortgage, lien or other interest therein". [*Section 18, Merchant Marine Act*, approved June 5, 1920; *U. S. Code, Title 46, Section 808*].

These enactments seem definitely to dispose of this question. Congress must be presumed to have well under-

stood the distinction made in law between the liability of a quasi-public corporation for the negligence of its employes, if such corporation is engaged in carrying on a private or proprietary rather than a public function, and it has endeavored, through these enactments, to make it clear and definite that the operation of the merchant fleet should be regarded as a private and proprietary function.

The liability of a quasi-public corporation, such as the Fleet Corporation, acting in its private and proprietary capacity, for the negligence of its employees, is a principle of law which has been firmly established through the authority of this court and the highest courts of many states. [*Fleet Corporation* v. *Sullivan*, 261 U. S. 146 (1922); *Hopkins* v. *Clemson College*, 221 U. S. 636, 647 (1921); *Weightman* v. *Corporation*, 66 U. S. 39 (1861); *Richmond* v. *Warehouse Corporation*, 148 Va. 60, 70 (1927); *Gibson* v. *Pryor Brown Transfer Co.*, 290 S. W. 33 (Supreme Court of Tenn. 1926); *Central R. R. & Banking Co.* v. *Lampley*, 76 Ala. 357, 366 (1884); *United States* v. *Atlantic Coast Line R. R.*, 215 Fed. 56, 59 (C. C. A., 4, 1914); *McQuillin on Municipal Corporations*, Section 2792; *Story on Agency*, Section 308].

The intent of Congress in passing the Shipping Act of 1916 to render the operation of the Emergency Fleet when used as commercial vessels subject to the same laws as pertained to the operation of merchant vessels by private persons, seems fairly clear, but there is stronger evidence of a like intent on the part of Congress in passing the Merchant Marine Act in 1920. The situation ex-

isting at the time Congress legislated in 1920 [*United States* v. *Anderson*, 9 Wall. 56, 65 (1869)], appears in its debates and help to explain its purposes. This statute, known as the *Merchant Marine Act*, or *Jones Act* (41 Stat. 988-1008) substantially revised the *Shipping Act of 1916*.

In brief, these circumstances referred to in these debates were:

(1) The close of the War leaving the United States in ownership and possession of a great fleet of ships acquired for War purposes, but not suitable for naval vessels;

(2) The destruction of the World commerce carried on by the ships of Germany and Austria and the "golden opportunity" of the United States to regain the leadership in overseas commerce which it had in the clippership era;

(3) The disastrous failure of the government in its operation of the railroads;

(4) The crushing burden of indebtedness (over three and a half billions of dollars) which had been incurred by the merchant fleet enterprise.

After many conferences and reports involving a legislative history, extending from November 5, 1919 to June 5, 1920, (see history of Merchant Marine Act Appendix, page 3), the Merchant Marine Act was evolved, showing plainly that the United States was in the "shipping business" in a big way without wanting to be in it, and that it was taking that which seemed to be the best way of getting out of this business with the least amount of financial loss and with a prospect of financial profit to the Government and to the people of the United States.

The purposes motivating the regulation of the Fleet Corporation were still private and proprietary, and even more so than in the beginning in 1916 when it was organized. We call particular attention to Sections 1, 5, 7 and 14 of this latter act, the Merchant Marine Act.

By an indirection it is stated in Section 12 that the policies and purpose of the act are declared in Sections 1 and 5. Section 1, to start with therefore, declares that it is necessary to have a merchant marine to "serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States".

The Government doubtless would emphasize the first part of this clause down to "ultimately".

We emphasize the latter part of the sentence and call attention to the fact that if there is any inconsistency, the latter part of the sentence being later in point of time governs. [*Frost* v. *Weenie,* 157 U. S. 46, 58 (1894); *Lewis Sutherland Statutory Construction,* 2nd Ed. Sec. 349].

Section 5 refers to the sale, rather than to the operation of the vessels, but shows perhaps better than any other section, the commercial purpose of the act. Here it is stated what facts the Shipping Board shall take into consideration in selling the vessels and concludes with "and any other facts or conditions that would influence a prudent solvent business man in the sale of similar vessels or property which he is not forced to sell".

Section 7 provides for the maintenance of steamship lines until "in the opinion of the Board the maintenance thereof is *unbusinesslike* and against the public interest".

Section 14 provides for the covering of net proceeds into the Treasury of the United States as miscellaneous receipts, and also authorizes the Board to withdraw the investments made by the Government during the War in emergency and cover the net proceeds into the Treasury of the United States.

There can be no doubt from these sections of the Merchant Marine Act that the Government not only expected the Fleet Corporation to make a profit while proceeding with the orderly liquidation of its shipping interests, but also to retrench those expenditures made during War time. These sections show that the Legislature intended that the Fleet Corporation was to function as a strictly private and commercial business, and like any other business corporation, was to have the businessman's point of view.

The private purpose of the Fleet Corporation was specifically recognized in a report submitted about a year following the passage of the Merchant Marine Act by the Select Committee on United States Shipping Board operations. (See extract from this report in Appendix, page 8).

On pages 28 and 33 of the Government's brief, an argument is made under Section 8 of the Suits in Admiralty Act that the provision for payment of decrees against the Fleet Corporation with public money supports the Government's theory that the Fleet Corporation is a public agent and that the activities of the Fleet Corporation are also public, which seems to us to be a wholly erroneous and narrow interpretation of this section.

With the change of purpose affected by the Merchant Marine Act of 1920 from a sale of the stock of the Fleet

Corporation to a sale of the ships operated by the Fleet Corporation and the covering of the proceeds into the Treasury of the United States, it was necessary to free the ships of all liens, in order to make efficacious the prompt sale of the ships. The proceeds of the sales, which represented the ships, as well as the proceeds of the operation of the ships, were to be covered into the Treasury of the United States and it was therefore only logical that the payment of judgments arising out of the operation of the ships should be paid from the same repository as that into which were covered the proceeds of such sales and operation.

The section specifically states that the judgments shall first be payable out of any "appropriation or insurance fund or other fund especially available therefor".

It was not properly public money, but rather Fleet Corporation or ship money, which was to go to pay these judgments.

It seems to us that this suggestion of the Government is without significance when it is borne in mind that Congress knew at the time of the passing of the Merchant Marine Act of 1920 that the operation of these ships had been carried on by a private corporation. It had just been passing legislation to relieve the ships from the seizure to which they were subject by reason of the fact that they were operated by such a private corporation, and notwithstanding that fact they made no effort to change that relationship or to change the manner of operating the vessels, but by the Merchant Marine Act authorized the continued operation of the vessels by this private corporation and re-enacted, as above stated, the provision that when operated as merchant vessels they should be subject to the same liabilities as when operated by a private person.

II. Even in the absence of what we regard as an express recognition on the part of Congress of the proprietary character of the business of merchant shipping the Fleet Corporation was expected to undertake, and the liabilities resulting therefrom, it would follow as a matter of law that the operation of this merchant fleet was a proprietary, rather than a governmental function. This merchant shipping business of the Fleet Corporation has been judicially recognized to be inherently of this character.

To sum it up briefly, we find the courts referring to the government's shipping industry carried on by the Fleet Corporation as:

> "Her service at the time was purely commercial".
>
> [Page 256, Mr. Justice Pitney, in *The Lake Monroe,* 250 U. S. 246 (1918)].

> A "business corporation engaged * * * in * * * a private enterprise."
>
> [Judge Cardozo at page 383, in *Cox* v. *Lykes Bros.,* 237 N. Y. 376 (1924)].

> "Functioning as a great industrial business corporation".
>
> [*Haines* v. *Lone Star Ship Building Co.,* 268 Pa. 92, 100 (June 26, 1920)].

> "The object for which the corporation is created is a matter of private business".
>
> [*Chase National Bank* v. *Fleet Corporation,* 294 Fed. 641, 648, (C. C. A., 2, 1923)].

> "Enters the domain of business and commerce such as operating merchant vessels".
>
> [*United States* v. *Miller,* 28 F. (2nd), 846, 850 (C. C. A., 8, 1928)].

"The business of the Fleet Corporation was not particularly governmental in its nature but was commercial and industrial".

[*Fleet Corporation* v. *Wood*, 274 Fed. 893, 899 (C. C. A., 2, June 15, 1921)].

"A purely commercial undertaking".

[*Lord & Burnham Co.* v. *Fleet Corporation*, 265 Fed. 955, 959 (D. C. N. D. Ill. 1920)].

"Enters the sphere of commercialism".

[Judge Neterer on page 385 in *United States* v. *Skinner & Eddy Corp.*, 28 F. (2d) 373 (D. C. W. D. Wash., 1928)].

"A commercial enterprise".

[*Wallace* v. *Fleet Corporation*, 5 F. (2d) 234, 236, (D. C. W. D. Wash. 1925)].

With respect to the business of other shipping corporations of other sovereignties, the same principle of the recognized private character of the business has been adopted. [*Hutchinson* v. *Western & Atlantic R. R. Co.*, 6 Heisk (Tenn.) 634 (1871); *Moore* v. *Board of Trustees*, 7 Ind. 462 (1856)].

Another corporation operating ships of which the Government has been the sole stockholder for approximately twenty years, and operating under statutory provisions which require the profits annually to be covered into the Treasury of the United States (37 Stat. 560), is the Panama Railroad Company. This corporation has been held to the liability of a private business corporation. [*Panama Railroad Co.* v. *Curran*, 256 Fed. 768 (C. C. A. 5, 1919); *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375 (1924)].

The operation of the ships, the chartering of the vessels, and the organization of shipping routes involves high qualities of iniative and resourcefulness, the characteristics of a private rather than a governmental enterprise. In keeping a check on the charters of the ships and keeping a check on the seamen that are employed, the Fleet Corporation becomes involved directly and indirectly with obligations assumed with respect to the individual, rather than to the government.

It would seem to be sufficient that the Fleet Corporation was organized under the laws of the District of Columbia under statutes relating to the organization of private corporations in general, and that there was no suggestion whatever of governmental purpose stated in its charter and that under the laws of the District of Columbia there was authority to sue and be sued.

That there was no intention on the part of Congress of any such governmental purpose is very clear from the remarks of Senator Jones, Chairman of the Senate Committee in charge of the bill in explaining its provisions before the Senate (Appendix, page 6). (History of Merchant Marine Act, Appendix, page 3.)

Without considering what might have been done, *the fact of its having been organized as a private corporation itself implies that its objects and purposes were private.* "But it was organized * * * as a private corporation." [Justice Brandeis, in *Skinner & Eddy* v. *McCarl,* 275 U. S. 1 (1927)].

Before leaving the subject of the public nature of the shipping business, we point out the defect in certain arguments in the Government's brief as not applicable to the facts of these two cases.

We recognize, of course, that the Fleet Corporation was an instrumentality of the Government of the United

States and carrying on various functions which the government deemed essential to build up an auxiliary for its naval forces, and that as such instrumentality of government, it was entitled to the benefits conferred upon the government and all of its departments and agencies by the Post Roads Act [*Fleet Corporation* v. *Western Union,* 275 U. S. 415, 421 (1928)].

But this does not alter the fact that the functions of the Fleet Corporation were of a private or proprietary nature when considered with relation to merchant shipping and the rule of law with respect to the liability of such a corporation for the negligence of its employes in the course of such work. Nor is it of importance that, in its benevolence, the government has deemed it appropriate to extend to the employes of the Fleet Corporation the benefits of the Federal Employer's Liability Act [34 Opinions of Attorney General, 363].

In the Merchant Marine Act itself (Section 33) Congress specifically stated that seamen should have the right of trial by jury in an action at law to recover damages for personal injuries, and made no exception with relation to seamen employed by the Fleet Corporation. Numerous attempts have been made to bring seamen under the compulsory compensation acts but Congress has steadfastly refused to enact such legislation.

It is equally unimportant that this Court recognized a claim by the Italian Government that ships owned and operated by it were not subject to suit and seizure. [*The Pesaro,* 271 U. S. 562 (1925)]. The question there involved was not one of substantive right, but of remedy. The question here involved is one of substantive right; that is, the liability of the Fleet Corporation for the negligence of its employees,—not the remedy for the en-

forcement of this right either by suit against the Government or by seizure of Government property.

The Fleet Corporation counsel seem to have confused the question here involved with cases involving the rules relating to public officers, citing in support of its argument, *Story on Agency,* Sec. 319, and *Robertson* v. *Sichel,* 127 U. S. 507, 517 (1887) and other authorities to the same effect, but this defense is wholly inapplicable for several reasons: (1) It applies only to individuals; (2) is intended to prevent discouragement of individuals in the Public Service unable to assume such responsibility, the embarrassment of a contrary doctrine and the prevention of demoralization of the Public Service; (3) under this doctrine the employees themselves are government officers, though of an inferior grade [*Story on Agency,* Section 321; *Meachem on Agency,* Section 1502]; whereas employees and officers of the Fleet Corporation or of the persons to whom the ships have been chartered are not officials of the United States [*United States* v. *Strang,* 254 U. S. 491, 493 (1921)]. Operating agreement, Section 7 (Lustgarten R., 178).

III. There is really nothing in this question which has not been decided. We have chosen to meet the Government on its own ground of defense, based upon the nature of the work in which the Fleet Corporation is engaged because we are confident of the fundamental error of this defense.

The defense, however, that the Fleet Corporation is not liable because the injuries received and the damage

done arose out of a public service, was decided in the negative by this Court as early as 1922 in the case of *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549 (1922) with respect to the second contract there under consideration.

In the brief of the Government prepared in opposition to *Johnson's* case and served at the time of the previous argument in February, 1929, the statement is made that the *Sloan* case was concerned with an instance in which the Fleet Corporation was "acting in its corporate capacity and interest, and in its own name incurred obligations", but that this is not the fact appears from the statement of the Court on page 568. Here the majority of the Court, opinion by Mr. Justice Holmes, state:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation 'representing the United States of America'. The Fleet Corporation was the contractor even if the added words had any secondary effect."

Does the Government think that they have created a legal revolution by changing the language of their contracts, reading "the Fleet Corporation representing the United States of America", ~~rather than~~, "the United States of America acting through the United States Shipping Board represented by the United States Shipping Board Emergency Fleet Corporation"? [*Lustgarten,* R. 177.]

We take it that the answer which this Court has given to this defense is simply that it was not acting

as a public agent or as an agent of the United States upon public business, but that it was acting for itself and upon its own business.

That such is the view of this court, and that the matter is now *stare decisis,* has been the opinion of other distinguished courts.

The Court of Appeals in the District of Columbia in *Fleet Corporation* v. *O'Shea,* 5 F. (2d) 123, 125 (1925) merely stated the point was not tenable, citing the *Sloan* case among numerous cases.

In *Dietrich* v. *Fleet Corporation,* 9 F. (2d) 733 (C.C.A. 2, 1925) Chief Judge Rogers writing for the court quoted the portion of the opinion of Mr. Justice Holmes in the *Sloan* case set out above and considered the point closed as to contract liability.

That this point was in issue in the *Sloan* case appears moreover from page 59 of the record in that case, (No. 28247, filed April 25, 1921). The affidavit supporting the motion of the Government, to dismiss the bill of complaint, states: "Said defendant was not acting in its own behalf as shown, but solely as the agent and instrumentality of the United States of America within the limits of its authority and the scope of its employment".

As to whether the liability in the *Sloan* case is imposed with respect to the acts of an agent of the Fleet Corporation, as distinguished from an act of the Fleet Corporation itself, the same matter of fact is, of course, presented. A corporation being a fictitious entity of the law, it cannot act except through agents. [*Barnes* v. *District of Columbia,* 91 U. S. 540, 545, (1875); *Story*

on Agency, Section 16.] The act done in the *Sloan* case must have been an act done by an agent just as in the *Johnson* and *Lustgarten* cases, and there is no distinction in the principle involved.

It is not lightly to be passed over that the injury to Lustgarten was suffered at the hands of the Captain. The Captain is not a fellow-servant with a member of the crew. He was the *alter ego* of the Fleet Corporation and the Consolidated Navigation Company. [*The Hamilton,* 146 Fed. 724, 727 (C.C.A. 2, 1906).

IV. By the managing operating agreement, the Fleet Corporation made itself and the persons to whom it chartered the steamships, "Jacksonville" and "Coelleda", liable as owners *pro hac vice* for torts occurring in the operation of vessels, as an owner. The business upon which the Fleet Corporation was acting was its own business, and not the business of the United States.

The operating agreement purports to be an agreement made between the United States as the owner, and the persons to whom the ship is chartered, called the agent, (Lustgarten R. 177). The agreement is signed by L. C. Palmer, President of the Fleet Corporation (Lustgarten R. 181). In the record he also signs as President of the Consolidated Navigation Company but this is a typographical error. We shall therefore treat this agreement as one between the Fleet Corporation on the one hand, referred to as the owner, and the Consolidated Navigation Company on the other hand, referred to as the agent.

Contracts of affreightment are of two kinds, in one of which the owner parts with possession, command

and navigation of the ship, in which case the charterer is considered as the owner for the voyage or service stipulated. [*United States* v. *Shea,* 152 U. S. 178, 187 (1893)]. *Reed* v. *United States,* 78 U. S. 591, 600 (1870)]. Under *U. S. Code* Title 46, Section 186, an owner *pro hac vice* within the meaning of the provision relating to limitation of liability, is one who shall "man, victual and navigate such vessel at his own expense". Both the Fleet Corporation and the Consolidated Navigation Company are owners *pro hac vice* within these definitions.

It is certain that the Fleet Corporation and the so-called agent, together, absolutely controlled the operation of the ship and manned, victualed and navigated such vessel at their own expense. Also they shared in the profits, for under Section 11 of the operating agreement it is stated that the agent is to get as compensation a percentage of the gross freight inward and outward, and of the passenger revenue.

[In discussing the operating agreements our references to sections are to the operating agreement in the *Lustgarten* case, beginning on page 177, the operating agreement not having been printed in the *Johnson* case, but being in the possession of the Government and covered by stipulation as to Exhibits—Johnson, R. 68, 183].

While the operating agreement refers to the fact that the Navigation Company is to pay the expenses and charge the same to the account of the owner, (Sections 3 and 4) the other terms of the contract make it clear that these expenses were to be paid by the Fleet Corporation as the agreement required that the moneys which the agent collected were to be deposited in a bank named by the Fleet Corporation, and subject to the con-

trol of the Treasurer of the Fleet Corporation. [Section 9]. These monies were not to be paid directly into the Treasury of the United States and it is clear that it is the Fleet Corporation who was to reimburse the agent for the expenses it incurred in operating the ships.

By separating its duties and functions, and delegating part of them to an agent, the Fleet Corporation cannot escape the liability of an owner *pro hac vice*. It shared the management of the ship, the contract having provided that the management, operation and conduct of the business of the vessel should be under the supervision and direction of the Fleet Corporation. [Sections 1 and 2]. The route or trade name of the ship was to remain the property of the owner. (Section 17).

With respect to the liability of the Fleet Corporation to judgment in these cases, it is rather unimportant to determine whether the Consolidated Navigation Company was an owner *pro hac vice*. If it was such owner, the Government recognizes its obligation to reimburse the Navigation Company, saying: "The Government would have to reimburse the Navigation Company if it should be compelled to pay any damages for personal injuries incurred in the operation of these vessels, under the circumstances presented in the instant case." [Pages 28 and 29 of the Government's Brief, *Lustgarten* case].

It seems, however, that the Navigation Company was also an owner *pro hac vice*, as it agreed to manage, operate and conduct the business of the vessel, [Sections 1 and 2]; to man, equip, victual and supply the vessel, [Section 3]; and to maintain the vessel in good repair [Section 4]; and it rendered itself individually liable for the expenses. [See the payrolls, not printed in the record, but covered by stipulation as to Exhibits], although it was entitled to reimbursement from the Fleet Corporation.

These operating agreements of the Fleet Corporation have been judicially construed on several occasions, and the charterer, as well as the Fleet Corporation, both with respect to contract and tort liability, have been held to a joint liability, as owners *pro hac vice.* [*Greenwald* v. *Fleet Corporation,* 16 F. (2d) 948, 951 (1927); *Cox* v. *Lykes Bros.,* 237 N. Y. 376, 383 (1924); *Stewart* v. *Fleet Corporation,* 7 F. (2d) 676, 678 (1925); *Fleet Corporation* v. *O'Shea,* 5 F. (2d) 123, 124 (Ct. of Appeals, Dist. of Col., 1925)].

As such owner *pro hac vice,* the business upon which the Fleet Corporation and/or the so-called agent were engaged at the time the wrongs sued upon in these common law actions were committed, was their own business, not that of the United States. Each was acting for itself alone. Between them they had possession and control, complete and unrestricted. The contracts of employment were their contracts; the stores, their stores; the payments for wages, as well as for other expenses, their payments; their own profit and their own losses.

We find in this operating agreement, the answer to the entire argument of the Government to the effect that the Fleet Corporation at the time the injuries sued for in these two cases were received, was acting as a public agent of the United States.

V. The Fleet Corporation is very particular to draw attention to the fact that the name of the United States is signed to the operating agreement. What the Fleet Corporation does not do is to show its authority for so signing the name of the United States to this agreement.

The records in the *Johnson* and *Lustgarten* cases do not contain a particle of evidence showing the authority of the person who signed the name of the United States to the operating agreements, or by what authority they were signed. It is not even shown who the person was who signed the name of the United States to that contract.

We submit that there is no authority in any of the statutes relating to the Fleet Corporation or to the merchant fleet enterprise, which confers this authority on the Fleet Corporation to so bind the United States. "A corporation as such has no authority to sign the name of its stockholder to a contract and bind him as sole or joint obligor." [*Tabas* v. *Fleet Corporation*, 22 F. (2d) 398, 400 (C. C. A. 3, 1929), *United States* v. *Strang*, 254 U. S. 491, 493 (1920)].

The Merchant Marine Act of 1920 authorizing the operation of merchant vessels by the Fleet Corporation must be construed in the light of the fact that under a similar authorization conferred by the Shipping Act of 1916, the Fleet Corporation had operated the ships not merely as an agent, but as an absolute owner or as an owner *pro hac vice*. The Merchant Marine Act must have been passed with the knowledge of this fact, and no attempt was made in the act to change the character of the operation of the ships from that of the individual private business of the Fleet Corporation to that of an agency in such business for the United States.

The operating agreements in these cases were nothing more than a screen of words under which the Fleet Corporation endeavored to shirk the responsibilities which Congress very plainly desired to impose upon it.

POINT TWO.

IT IS NOT AN EXCLUSIVE REMEDY THAT IS GIVEN AGAINST THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION BY THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1920, FOR LIABILITY OF THE FLEET CORPORATION GROWING OUT OF THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND DOES NOT BAR THE COMMON LAW ACTIONS INSTITUTED IN THESE TWO SUITS.

I. The Suits in Admiralty Act should be construed in harmony with the later act of June 5, 1920, the Merchant Marine Act, and so as to sustain the present common law actions *in personam* brought against the Fleet Corporation.

It is important to state the particulars of the two acts, of the Suits in Admiralty Act and the Merchant Marine Act. The Suits in Admiralty Act was Senate Bill 3076, approved March 9, 1920, and is Chapter 95 of the Laws of the Sixty-Sixth Congress, Second Session, (41 Stat. 525-528). It is also to be found in *U. S. Code,* Title 46, Sections 741 to 752 inclusive. The Merchant Marine Act was House Resolution No. 10378, approved June 5, 1920, and is Chapter 250 of the Laws of the Sixty-Sixth Congress, Second Session, (41 Stat. 988-1008). Its provisions are variously distributed in the U. S. Code. [*U. S. Code,* Title 46, Sections 13, 597, 599, 688, 802 to 805, 808, 812, 813, 861 to 889, 911, 921 to 927, 941, 951 to 954, 961, 971 to 975, 981 to 984.] The Suits in Admiralty Act was first proposed to Congress in the Senate September 25, 1919, whereas the Merchant Marine Act was not introduced until about two months later, November 5, 1919, when it was pre-

sented in the House. (See Histories of Merchant Marine Act and Suits in Admiralty Act, Appendix, pages 3 and 5).

Section 18 of the later act, [*U. S. Code,* Title 46, Section 808], reenacted word for word the former Section 9 of the Shipping Act of 1916.

For convenience we place together the exclusive language of the Suits in Admiralty Act and the pertinent language of Section 18.

> "No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Railroad Company. (Mar. 9, 1920, c. 95, Sec. 1, 41 Stat. 525.)"
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> * * * * * * * *
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> "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (June 5, 1920, c. 250, Sec. 18, 41 Stat. 994)."

It was this former Section 9, now Section 18, under which vessels of the United States, operated by or through the Fleet Corporation, were held subject to judicial process *in rem* in the case of *The Lake Monroe,* 250 U. S. 246 (1919). It was the inconvenience of such seizures and the desire to be rid of the same, which was the main purpose behind the passage of the Suits in Admiralty Act. [*Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686, 691 (1926); *Blamberg Bros.* v. *United States,* 260 U. S. 452, 458 (1923)].

Section 13 of the Suits in Admiralty Act, (a provision not found in the U. S. Code), repealed all prior inconsistent acts, but Section 13 of course had no application to Section 18, passed two months later.

In re-enacting Section 9 providing that these vessels were to be subject to the liability of merchant vessels generally, notwithstanding the fact that there had intervened the Suits in Admiralty Act, Congress plainly indicated that it regarded this section as having a scope extending beyond any question of its being limited to applying only to remedies *in rem,* and showed a continuing intention to place the Fleet Corporation, as nearly as possible AND its vessels, on the same general basis as private shipping companies operating private merchant vessels.

The later act, the Merchant Marine Act, was a general act consisting of thirty-nine sections, revising previous laws with relation to the American Merchant Marine besides dealing particularly with the United States Shipping Board Emergency Fleet Corporation.

A most important change was made by this Merchant Marine Act in the Seaman's Law at this time, 1920, when in Section 33. it amended Section 20 of the Act

of March 4, 1915, so as to give any seaman suffering personal injuries *an action for damages at law with the right of trial by jury.* Nothing was said with respect to any limitation of this right where the cause of action was against the Fleet Corporation, and it would seem, therefore, that in view of Sections 18 and 33 of the subsequent Merchant Marine Act, that Congress intended that the Suits in Admiralty Act should be subject at least, to sufficient construction in lessening its exclusive features so as to permit the present common law actions against the Fleet Corporation to be maintained.

Since both acts refer in substance to the same subject, and were passed at the same Session of Congress, the sections may be held to be in *pari materia* and are to be construed harmoniously, if possible, but if that is impossible, the Merchant Marine Act being later in point of time controls. [*Frost* v. *Weenie,* 157 U. S. 46, 58 (1894); *Lewis Sutherland Statutory Construction,* 2nd Ed., Section 349].

The reasonable construction of the two statutes is that the Suits in Admiralty Act is a permissive statute relating only to causes which suitors may wish to institute by libel on the Admiralty side of the court.

In Section 2 of the Suits in Admiralty Act it is stated that "a libel *in personam may* be brought". We emphasize "may".

The test of the bringing of such action is also stated in Section 2 to be whether a "proceeding in Admiralty could be maintained". The common law action is not referred to.

It is reasonable to conclude that the Act was intended to be permissive as to the privilege of a suitor to go either into the admiralty courts or into the common law courts, and exclusive only of the remedies of the suitor in the event he elected to proceed in admiralty.

The wrongs suffered by *Johnson* and *Lustgarten* gave them in addition to the common law remedy, a proceeding by way of libel on the Admiralty side of the Court *in personam.* [*Leathers* v. *Blessing,* 105 U. S. 626, (1881); *The Iroquois,* 194 U. S. 240 (1904)]. In other words, if they had chosen to go into the Admiralty side of the Court to redress their wrongs, they could only have had the remedy *in personam,* provided by the Suits in Admiralty Act.

II. The right to sue the Fleet Corporation at common law with the right of trial by jury, has been saved to the present plaintiffs by the Saving Clause in the Judiciary Act and by the *Seventh Amendment* to the *Constitution* and such a construction of the Suits in Admiralty Act which would render it unconstitutional *or even create a doubt as to its unconstitutionality* should be avoided. [*Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 390 (1923)].

The common law remedy was in existence before the passing of the Judiciary Act [*Story Commentaries on the Constitution,* 4th Ed.; Sec. 1672, Note 4; *The Hamilton,* 207 U. S. 398, 404 (1907)], and the Seventh Amendment which was proposed for adoption by Congress at the same time that the Judiciary Act was passed, conferred the right of trial upon this pre-existing remedy.

In saving the common law remedy in 1789, Congress saved it because it could not and it deemed it could not have taken it away.

The first Congress in the Judiciary Act of 1789 in dealing with all cases of Admiralty jurisdiction *saved to suitors in all cases* the right of a common law remedy where the common law was competent to give it. [1 Stat. 76, 77; *United States Code,* Title 28, Sections 41 and 371].

With common law remedies thus protected and saved, the present common law action was brought against the Fleet Corporation *in personam* for a maritime tort. The plaintiffs had this common law remedy because the common law was competent to give it. [*Steamboat Co.* v. *Chase,* 16 Wall. 522, 533 (1872)].

By proceeding at common law these plaintiffs had as part of the remedy, the right of trial by jury. [*Chelentis* v. *Luckenbach Steamship Co.,* 247 U. S. 372 (1917); *Philadelphia R. R. Co.* v. *Berg,* 274 Fed. 574 (C. C. A., 3, 1921); *Bonham* v. *Southern Menhaden Corp.,* 284 Fed. 362 (D. C., S. D. Fla., 1922)].

Congress has no right to declare that a citizen shall be deprived of a common law action and the right of trial by jury which he has concurrently with a remedy *in personam* in Admiralty against the Fleet Corporation, by declaring that he must proceed, if at all, only in admiralty and without right of trial by jury. So construed, Congress would be taking away a right of trial by jury in a field of remedial law over which capacity to so legislate was reserved from it by the *Seventh Amendment,* and the constitutionality of the Suits in Admiralty Act would be placed in grave doubt.

Congress, it is conceded, could take away a remedy in the nature of a right of trial by jury, if Congress had created it. Congress could also create an exclusive remedy in connection with new substantive rights, in the Admiralty Courts because of the grant of jurisdiction in *Section 2, Article III of the Constitution, Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 386 (1923), but here the right involved has been reserved from the province of Congress by the *Seventh Amendment.*

Congress "saved" the common law remedy in actions for maritime torts, but this was merely "abundant caution" on the part of Congress. [Chief Justice Nelson on page 390, *New Jersey Steam. Navigation Co.* v. *Merchants Bank,* 6 How. 344 (1848)].

III. In the cases in which this Court has had occasion to construe the Suits in Admiralty Act, of which the principal cases are in the reverse order of their determination: *Fleet Corporation* v. *Rosenberg,* 276 U. S. 202 (1928); *Eastern Transportation Co.* v. *United States,* 272 U. S. 675 (1926); *Nahmeh* v. *United States,* 267 U. S. 122 (1925); *Shewan & Sons* v. *United States,* 266 U. S. 108 (1924); *Blamberg* v. *United States,* 260 U. S. 452 (1923), there has not been presented the point now in issue, as to whether apart from the Suits in Admiralty Act and at common law, the Fleet Corporation may be sued for its maritime torts, *nor has there been presented the question as to what has been the effect upon this Act of Section 18 of the later Merchant Marine Act.*

In the case of the *Fleet Corporation* v. *Rosenberg,* 272 U. S. 202 (1927), the case most nearly bearing upon

the present subject, the Court was studious to reserve decision upon the point of exclusive remedy presented in these two common law actions. There is nothing, furthermore, inconsistent between the decision in the *Rosenberg* case and the decision which we ask the Court to make in this instance. In the *Rosenberg* case, it was decided that the Suits in Admiralty Act excluded the former remedy *in personam* which existed against the Fleet Corporation under the General Maritime Law. Rosenberg Brothers lost because this action was not commenced within the two-year period of limitations.

Primarily the Court relied upon a strict construction of the Suits in Admiralty Act, and Rosenberg Brothers having chosen the Admiralty remedy, were forced to take that remedy with the restrictions which Congress had placed upon it.

Neither counsel nor the Court in the *Rosenberg* case considered the Suits in Admiralty Act with reference to the later Merchant Marine Act and the reincorporation of former Section 9 of the Shipping Act of 1916, and former Section 20 of the Act of March 4, 1915.

The brief of counsel for Rosenberg Brothers (see p. 24) in discussing this point, was principally concerned with an effort to get around Section 13 of the Suits in Admiralty Act, seemingly by oversight making no mention anywhere of Section 18 of the Merchant Marine Act. That counsel for Rosenberg Brothers was not successful in this effort, and that the Court did rely upon Section 13, is evidenced from the opinion of the Court in this case on page 214.

We claim that the question now before the Court is a question of the general policy behind the enactment of the Suits in Admiralty Act, and is therefore not to be restricted by anything decided in the *Rosenberg* case.

The *Rosenberg* case, as well as the case of *Eastern Transportation Co.* v. *United States*, 272 U. S. 675 (1926) were both cases of particular application. This Court remarked in the latter case on page 692 that there was nothing inconsistent in the decision there with the declaration as to the main purpose of the act as stated in the previous cases of *Shewan & Sons* v. *United States*; *Nahmeh* v. *United States* and *Blamberg* v. *United States*; such main purpose being the substitution of an Admiralty remedy *in personam* against the United States for a previously existing Admiralty proceeding *in rem* against merchant vessels of the United States.

No other purpose appears from the reports of the committees in charge of the passage of the Suits in Admiralty Act in Congress (see Appendix, pp. 7 and 8).

That there was no intention on the part of Congress of any such governmental purpose is very clear from the remarks of Senator Jones, Chairman of the Senate Committee in charge of the bill in explaining its provisions before the Senate (Appendix, p. 10). See History of Suits in Admiralty Act (Appendix, p. 5).

In none of the cases in which this Court has construed the Suits in Admiralty Act has the attention of the Court been drawn to the force which that act has in the light of the subsequent passage of Section 18 of the Merchant Marine Act.

IV. "The complete system of administration" although possibly a valid argument for the uniformity of the Admiralty remedy and administration provided for in the Suits in Admiralty Act, is, we submit, no argument in favor of a deprivation of a previously existing action at common law.

It is rather opposed to the exclusive construction. Section 4 of the Act, which limits the rate of interest to 4%, which judgments shall carry instead of the 6% rate of interest existing at common law in New York, is an additional taking away of a right and an additional argument for strict construction.

If a greater interest were to be given upon a judgment obtained against the Fleet Corporation in Admiralty than obtains at common law, or a broader remedy as to the Fleet Corporation than the one previously existing, it might be supposed that this was given in consideration of the forbearance of the common law action. There would be some *quid pro quo;* some natural justice in such a situation. [*Amstein* v. *Gardner,* 134 Mass. 4 (1883)].

A broadly exclusive construction taking away a common law action is a step in the wrong direction and an infraction upon jealousy guarded private rights, which the people are not to be deemed to have surrendered. "Under our system the people * * * are the sovereign," Mr. Justice Miller in *United States* v. *Lee,* 106 U. S. 196, 208 (1882).

The fact that the Attorney General is required under Section 12 of the Suits in Admiralty Act to report to Congress all suits under the act in which final judgments shall have been rendered, is, we submit, no argument for depriving citizens of their right to maintain common law actions. The Attorney General is not directed to report to Congress final judgments in suits involving land tort liabilities of the Fleet Corporation.

Nor is there any mention made with relation to judgments in other common law actions against the Fleet

Corporation; the reason no such reports of such judgments were required is obvious. The Suits in Admiralty Act deprived persons in dealing with the Fleet Corporation of the right of seizure of its ships and Congress wished to provide a speedy manner of securing payment of judgments recovered in Suits in Admiralty. Therefore it provided (Section 8), that those judgments should be paid out of the Treasury of the United States without further legislative action on its part. It knew this type of case proceeding *in rem*, very well and it could provide in advance for the payment of judgments in such cases.

In the case of judgments other than those in admiralty, on the other hand, further legislation would be required to appropriate funds for the payment thereof, and it would at that time be apprised of such other judgments as might have been recovered.

There is also an important distinction between the authority of the Attorney General to conduct the defense of a suit in admiralty against the United States and a similar authority with respect to actions at law against the Fleet Corporation.

The authority of the Attorney General to conduct the defense of these suits against the Fleet Corporation, not instituted in Admiralty, and to report the final judgment in such suits to Congress, is open to considerable question. Although the Attorney General does have general authority to appear for the United States where the United States is interested [R. S. Sections 359 and 367 U. S. Code Title 5, Sections 309, 316], yet the Fleet Corporation and the United States are separate and distinct parties and it is submitted that it was expected that the Fleet Corporation was to have its own counsel and was not to rely upon the Department of Justice for its legal services.

The Merchant Marine Act of June 5, 1920, in Section 3a [41 Stat. 988 at p. 990], specifically authorized the Board to employ such attorneys as it finds necessary for proper legal services.

It is reasonable to conclude that Congress intended the Fleet Corporation to function independently of any Governmental department, except in so far as it was absolutely necessary to protect the remedy *in personam* given against the United States, and in giving protection from seizure of the ships of the United States under Admiralty process *in rem*.

V. Construed as depriving the present plaintiffs of their common right to bring a common law action for a maritime tort against the Fleet Corporation, the act should be strictly construed with reference to a deprivation of the plaintiff's present common right, and no meaning should be given to it not within its express words.

This is not analogous to the situation in which a statute creates a right and provides a remedy, and such remedy is held to be exclusive. [*Barnet* v. *National Bank*, 98 U. S. 555, 558, (1878)]. This rule may apply, it is not conceded that it does, to suits against the United States. It should not apply to the Fleet Corporation, the defendant in these actions.

Here the remedy, the action at common law, was concurrent with the proceeding in Admiralty, even before the adoption of the Constitution, and the Judiciary Act of 1789. *Justice Story* considered that the common law remedy for maritime torts was concurrent with the Admiralty remedy and that, the exclusive jurisdiction clause

in the *Constitution, Article 3, Section 2,* was correctly construed to recognize it. (*Story Commentaries on the Constitution,* 4th ed., Sec. 1672, Note 4); See *The Hamilton,* 207 U. S. 390, 404 (1907)). The Fleet Corporation, as we have shown in Point One, has always been suable for its torts and the torts of its agents done in connection with its proprietary business, of operating merchant vessels.

The situation here is that of a statute which the Government attempts to construe as depriving suitors against the Fleet Corporation of a previously existing common law action, giving them in exchange a remedy by way of a libel *in personam* against the Fleet Corporation, which they already had, and a remedy by way of a libel *in personam* against the United States, whereas they already had a remedy substantially against the United States by way of a libel *in rem* against its vessels.

The construction that the Suits in Admiralty Act is exclusive of the present common law suits against the Fleet Corporation which have proceeded in the Federal courts, must also, of course, by the same process of reasoning, exclude common law suits against the Fleet Corporation brought in state courts, and the absurdity of the contention is clear in the face of the conceded province of state legislatures to control the remedies in state courts upon maritime matters. [*The Hamilton,* 207 U. S. 398, 404 (1907)].

If this statute is to be construed as one in derrogation of pre-existing rights, it must be strictly construed.

It has been so construed. [*Fleet Corporation* v. *Texas Star Flour Mills*, 12 F. (2d) 9, 12 (C. C. A., 5, 1926); *Wallace* v. *Fleet Corporation*, 5 F. (2d) 234, 236 (1925); *Wright* v. *Fleet Corporation*, 285 Fed. 647, 649 (D. C., S. D. N. Y., 1922)].

In giving the right to libel *in personam* against the United States it is conceded a remedy was given which did not exist before, but there were no express words in the act to the effect that this was in lieu of a pre-existing common law action against the Fleet Corporation,—*such an important change should not be left to implication.* [*Jackson* v. *S.S. Archimedes*, 275 U. S. 463, 467 (1928); *Lewis Sutherland Statutory Construction*, 2d Ed., Sec. 720].

The statute may have been intended to be exclusive with respect to remedies in Admiralty but in the absence of words expressly negativing the common law remedy, especially with respect to the Fleet Corporation, the common law remedy should be presumed to be cumulative and not within the scope of the act. [*Shaw* v. *Railroad Co.*, 101 U. S. 557, 565 (1879)].

Congress merely stated that no vessels owned by the United States or the Fleet Corporation should be subject to arrest and seizure by judicial process.

Congress refrained from stating that no common law action should be brought against the Fleet Corporation for causes of action growing out of its shipping operations. The Fleet Corporation is here asking the court judicially to legislate. They should go back to Congress.

VI. The maintenance of the present actions does not conflict with the terms of the Suits in Admiralty Act. The plaintiffs have not asked for process against the

vessels of either the United States or the Fleet Corporation.

The plaintiffs may be prevented from enforcing a judgment by an execution against a vessel of the Fleet Corporation or the United States, but that has nothing to do with the maintenance of the present common law actions and the recovery of judgment. [*Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549, 568 (1922); *Workman* v. *City of New York*, 179 U. S. 552, 565 (1900); *American Cotton Oil Co.* v. *Fleet Corporation*, 270 Fed. 296 (D. C., E. D. La., 1921)].

The consequences of the deprivation of the right to proceed at common law against the Fleet Corporation for a maritime tort, would be that suitors suffering a tort on land may sue at common law and have a jury trial, but persons suffering a tort at sea must sue by libel *in personam* without the right of trial by jury, although each may have asked only for a judgment *in personam*. The lack of sound distinction is plain and without natural justice to support it.

VII. In view of the organization of the Fleet Corporation as a private corporation with proprietary duties to perform, and its consequent liability as explained in Point One, it is not to be presumed that the only remedy by which such liabilities may be adjusted is a libel *in personam*, under the Suits in Admiralty Act. No other private corporation in the same line of business would be so restricted.

The history of the organization of the Fleet Corporation shows that it was intended to resort to the same

courts as any other private shipping company. Otherwise, an unequal basis of competition is established, unfair to private owners, and in many respects disadvantageous to the Fleet Corporation.

If the principle of the exclusiveness of the remedy applies to invitees and employees as in the *Johnson* and *Lustgarten* cases, then it applies equally well to passengers and contractors of all kinds having claims of a maritime nature. In all of these cases the restriction upon the remedy for adjusting business casualties must be, to a certain extent, hampering to the business of the Fleet Corporation, and against its own best interests.

The presumption is against the exclusiveness of the remedy with respect to a Government instrumentality engaging upon a commercial enterprise. The reasons for such presumption are ably stated in the opinion of Mr. Justice Allen, commencing on page 4, in the case of *Amstein* v. *Gardner,* 134 Mass. 4 (1883). As it was said by Judge Learned Hand, now of the Circuit Court of Appeals for the Second Circuit, but then District Judge, in the case of *Gould Coupler Co.* v. *Fleet Corporation,* 261 Fed. 716 (D. C., S. D. N. Y., 1919): "I have no disposition to strain the point in their favor."

The courts have judicially recognized that in entering upon commercial ventures it is highly desirable that the Fleet Corporation as a governmental agency, should be subject to the same tribunals as other persons similarly employed. [*Haines* v. *Lone Star Shipbuilding Co.,* 268 Pa. 92, 100 (1920)].

POINT THREE.

THE TWO YEAR PERIOD OF LIMITATIONS PRESCRIBED IN THE SUITS IN ADMIRALTY ACT IS NOT APPLICABLE TO THE LAW ACTION IN THE JOHNSON CASE.

I. Assuming that the Suits in Admiralty Act is not exclusive of the common law remedy saved to suitors under the Judiciary Act, the two-year period of limitations by its express terms would not be applicable to the Johnson action.

As stated in the United States Code Title 46, Sec. 745 this period of limitations which is contained in Section 5 of the Act (41 Stat. 526) states that: "Suits as herein authorized shall be brought within two years after the cause of action arises". "Suits as herein authorized" would not include a common law action. [*John G. Wright & Co.* v. *Fleet Corporation,* 285 Fed. 647 (D. C., S. D. N. Y., 1922)].

In bringing his common law action thirty-one months and twenty-three days after receiving his injuries, Johnson did not avail himself of the remedies provided for by the Suits in Admiralty Act. Not being a seaman as defined by the Jones Act neither did he have the remedy of *Section 33 of the Jones Act,* both of which acts have a two-year limitation clause.

Neither was the cause of action with which he went into the common law court created by either the Merchant Marine Act or the Suits in Admiralty Act. The liability of the Fleet Corporation arose out of the Shipping Act of 1916. The action of money damages for personal injuries is a transitory action at common law. The present common law action was therefore not in the category of "suits as herein authorized".

In the forum which Johnson chose to redress his wrongs, the Supreme Court of New York, there was a statute of limitations of three years. [*N. Y. Civil Practice Act,* Section 49].

When the action was later removed to the federal courts, it was still a common law action proceeding according to the mode of procedure in similar cases in the New York Supreme Court and subject to the same New York three-year statute of limitations [Act of Sept. 24, 1789, Ch. 20, Sec. 34; U. S. Code, Title 28, Section 725; *Leffingwell* v. *Warren,* 2 Black, 599 (1862)].

The Fleet Corporation being a private business corporation, the presumption is against the application of the two-year period of limitations. [*Stewart* v. *Fleet Corporation,* 7 F. (2d) 676, 679 (D. C., E. D. N. Y., 1925)].

II. The lower court of common law in trying the action which Johnson had brought under the Saving Clause, and at common law, was required to apply only the substantive and not the procedural maritime law. The two-year period of limitations being procedural and not substantive maritime law, its provisions could not have been enforced in the present common law action any more than the action itself could have been begun by the issuance of process *in rem* against the ship. [*The Moses Taylor,* 71 U. S. 411, 428 (1866)].

The cases cited by the Government for a contrary principle, [*Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 243 (1921) and *Engel* v. *Davenport,* 271 U. S. 33, 39 (1926)] are instances in which the statute limiting the remedy created both the remedy and the liability. This

is not the case here, as we have explained in Points One and Two. The responsibility of the Fleet Corporation was created in the act of its organization.

This court has frequently held that a statute passed in limitation of a liability which it does not create, as to personal actions at least, applies only to the remedy, and not to the right. [*Michigan Insurance Bank* v. *Eldred,* 130 U. S. 693, 696 (1888); *Townsend* v. *Jamieson,* 9 How. 407, 413 (1850)]. These were cases in contract but the same principle obtains in transitory actions of tort for personal injuries. [*Nonce* v. *Richmond & D. R. Co.,* 33 Fed. 432, 439 (C. C., W. D. N. C., 1887); *Bonhan* v. *Southern Menhaden Corp.,* 284 Fed. 362, 364 (D. C., S. D. Fla., 1922); *Krogg* v. *Atlanta Railroad,* 77 Ga. 202, 215 (1886)]. The two year period of limitation, here, then, limited only the remedy provided by the act of which it was a part.

The two-year limitation period, therefore, must be construed as not limiting the liability of the Fleet Corporation, in actions at common law but only limiting the time within which remedies provided for by the Suits in Admiralty Act could be availed of. With respect to the common law remedies enforced in the present actions, it had no application.

POINT FOUR.

NONE OF THE DEFENSES WITH RESPECT TO THE JOHNSON CASE NOR THE DEFENSE OF THE EXCLUSIVENESS OF THE REMEDY UNDER THE SUITS IN ADMIRALTY ACT AS IT APPLIES TO THE LUSTGARTEN CASE, IS PROPERLY BEFORE THIS COURT FOR ARGUMENT.

I. The chief objection we have under this head to the assertion of these defenses in this court is that counsel

for the Fleet Corporation themselves seemed to regard them as of no importance in the lower courts, and thus we have an almost complete lack of proof in this court upon which to base an intelligent discussion.

If at the time the injuries occurred in these two cases it was acting in the capacity of a public agent of the United States, that was a matter of fact for the Fleet Corporation to prove and it has not done so. [*Fleet Corporation* v. *Sullivan*, 261 U. S. 146 (1922)]. The court is simply limited by the record.

II. It is not merely a matter of insufficient attention to the facts either, for no motions and no requests to charge, and no exceptions to rulings were made with respect to these defenses. The entire emphasis of the Government's case upon the trial of both cases was upon the facts of negligence and damage with the single exception of the argument for public agency, the first of the defenses made in the *Lustgarten* case.

In the *Johnson* case, see motions at close of plaintiff's case (R. 92) and at the close of the whole case (R. 167), it was assumed at the trial during a colloquy between the court and counsel that the S. S. "Jacksonville" was being operated under a managing operator's agreement between the Fleet Corporation and the American Shipping Company (R. 56, 57, 68) and the trial was allowed to proceed without objection or exception. There was no argument at that time as to the three defenses now advanced.

In the *Lustgarten* case there was no exception, no motion in the trial court, and no assignment of error with respect to the defense of the exclusiveness of the remedy in the Suits in Admiralty Act. See motions at the close of plaintiff's case (Lustgarten R. 142, 143, 169),

and motions at the close of the whole case (Lustgarten R. 170).

The situation in the *Lustgarten* case is the same as that which confronted Judge Swan in *Smith* v. *Fleet Corporation,* 26 F. (2d) 337, 339, (C. C. A. 2, 1928) when he said in refusing to consider a belated defense of the Fleet Corporation under U. S. Code Title 31, Section 203: "This question was not presented to the trial court, was not covered by an assignment of error and was first suggested in appellant's reply brief."

CONCLUSION.

THE JUDGMENT IN THE LUSTGARTEN CASE SHOULD BE AFFIRMED AND THE JUDGMENT IN THE JOHNSON CASE SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

Respectfully submitted,

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(The italics in this brief are our own.)

Appendix.

CHARTER OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION (from Records on Appeal filed in this Court, Vol. 121 of October Term 1921, page 34 of Record. Sloan case):

"CERTIFICATE OF INCORPORATION

—of—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, a majority of whom are residents of the District of Columbia desiring to form a corporation under sub-chapter four (4) of the incorporation laws of the District of Columbia, and in pursuance of section eleven (11) of an Act of Congress entitled, 'An Act to Establish a United States Shipping Board', approved September 7, 1916, do hereby certify:

First. That the corporate name of this company shall be United States Shipping Board Emergency Fleet Corporation, and the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the *efficient and profitable conducting of said business,* as authorized by the

laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia, upon corporations under said subchapter four (4) of the corporation laws of the District of Columbia.

Second. The existence of this corporation shall be perpetual.

Third. That the capital stock of this corporation shall be Fifty Million Dollars ($50,000,000) divided into shares of the par value of One Hundred Dollars ($100) each.

Fourth. That the number of trustees who shall manage the concerns of the company for the first year, or until their successors are elected, a majority thereof being citizens of the District of Columbia, shall be seven (7).

George W. Goethals, 43 Exchange Place, New York, N. Y.

William Denman, 1070 Merchants Exchange Bldg., San Francisco, California.

John A. Donald, 18 Broadway, New York, N. Y.

William L. Solean, 1361 Harvard Street, N. W. Washington, D. C.

Richard H. Bailey, Jr., 1439 Fairmount Street, N. W. Washington, D. C.

Timothy C. Abbott, 2023 Park Road, N. W. Washington, D. C.

Ellsworth P. Bertholf, 1463 Harvard Terrace, Washington, D. C.

The Board of Trustees, by the affirmative vote of a majority of the whole board may appoint from the trustees or executive committee of three (3) members, and a Transportation Committee

of three (3) members of which a majority shall constitute a quorum, and to such extent as may be provided in the by-laws such committee shall have and may exercise all or any of the powers of the Board of Trustees.

Fifth. That the place in the District of Columbia in which the operations of the company are to be carried on is at Munsey Building in the City of Washington, District of Columbia.

This corporation reserves the right to amend, alter or change any provision contained in this Certificate of Incorporation in any manner prescribed by statute, and all rights conferred on stockholders herein granted are subject to this reservation.

IN WITNESS WHEREOF, we have hereunto affixed our signatures and seals this 16th day of April, A. D. 1917.

WILLIAM DENMAN [seal]
JOHN A. DONALD [seal]
GEO. W. GOETHALS [seal]
T. C. ABBOTT [seal]
E. P. BERTHOLF [seal]
RICHARD H. BAILEY, JR. [seal]
WILLIAM L. SOLEAN [seal]

* * * * * * *

MERCHANT MARINE ACT HISTORY (H. R. 10378 Congressional Record Index, 66th Congress, 1st and 2nd Sessions):

Nov. 5, 1919—Referred to House Committee on Merchant Marine and Fisheries, 7998 (Mr. Greene);
Nov. 6, 1919—Reported back (House Rep. 443) 8052;
Nov. 8, 1919—Debated 8142-8173;

Nov. 8, 1919—Amended and passed House 8173;
Nov. 8, 1919—Referred to Senate Committee on Commerce 8267;
May 4, 1920—Reported with Amendments (Senate Report 573)—6494;
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21, 1920—Debated: 6803-6816; 6857-6869; 6984-6994; 7036; 7043-7048; 7163; 7164; 7198; 7211; 7223-7227; 7274; 7291; 7293-7296; 7326; 7334; 7336-7346; 7347-7356; 7409-7420.
May 21, 1920—Amended and passed Senate 7420;
May 21, 1920—Senate requests conference with the House on the bill and amendments, and appoints conferees, 7420;
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" " " —Conference report submitted in House (H. Rep. 1107) 8588;
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" 5, " —Examined and signed, 8620, 8662;
" " " —Presented to President 8678.

HISTORY OF SUITS IN ADMIRALTY ACT (S. 3076). (Congressional Record Index, 66th Congress, 1st and 2nd Session):

Sept. 25, 1919, — Referred to Senate Committee on Commerce 5889 (Mr. Jones);
Sept. 27, 1919, — Reported back, (S. Rep. 223) 6017;
Oct. 22, 1919 — Debated, 7317, 7439, 7440;
" 24, " — Passed Senate, 7440;
" 25, " — Referred to House Committee on Judiciary 7538;
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" 19, 1920 — Debated, amended and passed House, 1750-1759;
" 20, 1920 — Senate disagrees to House amendment, appoints conferees, 1765;
" 21, 1920 — Conferees appointed for House, 1860;
" " " — House insists upon its amendments and agrees to conference, 1860;

Feb. 23, " — Conference report submitted in Senate, 3350;
March 1, " — Agreed to, 3690, 3691;
Feb. 28, " — Conference report submitted to House (H. Rep. 669), 3629.
" " " — Agreed to 3631
Mar. 4, " — Examined and signed, 3864, 3883;
" 9, " — Approved by the President—(Public, No. 156), 4068

REMARKS OF SENATOR JONES—(Congressional Record. V. 59, Pt. 7, 66th Congress, 2nd Session, page 7416):

"The bill is framed on the theory of getting the Government out of the shipbuilding and shipowning business, but it is not framed on the theory of getting the Government out of the shipbuilding and shipowning business at an undue sacrifice. I am just about as strongly opposed to that as is the Senator from Idaho (Mr. Nugent). We have tried to frame the bill in such a way as clearly to indicate to the Shipping Board that it is not the purpose of the bill, that it is not the intention of Congress, that they should sacrifice the interest of the people of the country in these ships simply to get them into private hands. We are not in favor of that. We do feel, however, that the people of the country want these ships ultimately to go into private hands; that that is the best way to build up and maintain an American Merchant Marine; but we realize that the shipping belongs to the Government. The situation confronting us is not like

the railroad situation, for the railroads belonged to private parties and the Government simply had possession of them, and of course we should turn them back as soon as possible. The Shipping Board fleet is the Government's property; it is not necessary to sacrifice it purely for the purpose of getting it into private hands; the committee is not in favor of doing it, and this bill is not framed on the theory of doing it." * * *

"It is not required to sell its ships immediately; it will put them on desirable routes and develop the business, and then it will sell the ships, and, in my judgment, will get every dollar out of them that it has put in and, in addition, will build up the trade of this country and establish the American Merchant Marine upon a permanent basis."

EXTRACT FROM HOUSE REPORT, No. 497, (66th Congress 2nd Session, submitted December 12, 1919 by the Committee on the Judiciary):

"The Government now has a very large number of vessels engaged both in foreign and domestic commerce. As a consequence some of them are constantly liable to be seized and detained for some reason or other. Almost daily such seizures occur, and under existing law there is no speedy remedy for their release. Whenever one is attached the negotiations that necessarily must follow occasion damages in large sums, as even a day's delay may mean the loss of two or three thousand dollars. The object of this bill is not to add to the liability of the Government, but to prevent the seizure and detention of our ships, so as to eliminate this unnecessary loss. Under mari-

time law jurisdiction is usually acquired by seizing the ship and detaining it until payment is made or a bond or stipulation furnished in lieu of payment. The bill provides a simple method of acquiring jurisdiction by service of process upon the United States and authorizes, as to ships seized in foreign countries, the giving of a bond or stipulation such as the courts there may require. It is believed that these provisions will greatly lessen the loss occasioned under the existing law.

The bill was originally drawn by one of the attorney for the Shipping Board, and at its direction. It has been carefully examined by the Attorney General and has his approval. It is strongly urged as emergency legislation greatly needed. A number of hearings were had in reference to this legislation, in which the committee was urged to modify the bill so as to authorize suits against the United States for damages occasioned by any public vessel, but as this would involve a radical change in the policy this Government has heretofore pursued, it was not deemed wise to embody the change in this bill. It might tend to materially delay passage of this legislation."

EXTRACT FROM SENATE REPORT NO. 223, (66th Congress, 1st Session, submitted Sept. 12, 1919, by the Committee on Commerce):

"The result of this is to subject the United States to unnecessary expense and its vessels to

great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels. The principal object of suits *in rem* is to insure the collection of the claim by subjecting the vessel to it. It is not necessary in the case of the United States, which is absolutely responsible, and under the bill ample provision is made for prompt payment of any claim found to be due."

EXTRACTS FROM HOUSE REPORT No. 1399, (66th Congress, 3rd Session, submitted March 2, 1921, by the Select Committee on United States Shipping Board Operations):

> "The board was authorized by the shipping act to form with a capital stock not exceeding $50,000,000 one or more corporations for the 'purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels for the commerce of the United States.' *The purpose of this authorization was to place on a competitive equality with private shipping, vessels operated under Government appropriations, by exempting the latter on the one hand from government restrictions not adapted to commercial practices, and by withholding from them on the other hand such special immunity in domestic or international law as is customarily associated with governmental activity.*"

REMARKS OF SENATOR JONES—(Congressional Record. V. 58, Pt. 7, 66th Congress, 1st Session, pages 7317, 7318):

"Mr. King. Mr. President, I should like to ask the chairman of the Committee on Commerce what change, if any, this bill makes in existing law. It seems to me that this measure ought to have gone to the Committee on the Judiciary. That committee is now considering a bill extending the jurisdiction of the district courts to hear causes of action against the Government of the United States, and it seems to me that this is legislation of the same character as that which is being considered by the Judiciary Committee.

Mr. Jones of Washington. Mr. President, I will say to the Senator that the purpose of the measure is this: Under the language of the shipping act the Supreme Court has held, in a recent case, that the ships of the Emergency Fleet Corporation for example, are subject to the application of the same remedies for damages that private ships are, and therefore if one of these Emergency Fleet Corporation ships, a ship of the United States, causes damage and is libeled, the ship is attached and held until bond is given. It seems that the officers of the ships have no authority to give bonds, and so the Government is put to a great deal of inconvenience and loss. The purpose of this bill is to avoid that by simply providing that persons having claims growing out of the action of these ships, instead of having a suit in rem against the ship, as they have against private ships, shall have a suit *in personam* against the United States, which everybody, of course, recognizes is perfectly good. That allows

the ship, then, to go on about its business. That is really the purpose of this bill, and while the bill is rather long and has to be in order to meet various situations, yet that is the principal purpose of it. It gives the consent of the Government to a suit *in personam* against it.

* * * * * * * *

Mr. Smith, of Georgia. I understand that the Senator from Washington agrees that the bill may go over.

Mr. Jones of Washington. Oh, yes; but I do hope Senators will look into it very carefully, because we are confronted with a very serious situation. I want to say that the Attorney General's office called me up day before yesterday, I think, and stated that there was a ship down in New Orleans that had been libeled and the court there refused to allow it to go. They have no way in which they can furnish bond unless they go out and arrange it in a roundabout way, as an accommodation for the Government on the part of somebody to furnish a bond so that this ship may go into commerce. That condition of things ought not to exist, of course, and we are trying to avoid it in the future."

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No. 220 5

In the Supreme Court of the United States

OCTOBER TERM, 1928

JOHN JOHNSON, PETITIONER

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

U. S. GOVERNMENT PRINTING OFFICE: 1928

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 223) is not reported. The charge to the jury by the District Judge appears at pages 196–211 of the record.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered March 26, 1928. (R. 225.) Petition for certiorari was filed in this case on June 22, 1928.

THE QUESTION PRESENTED

The question presented is whether one who has no contractual relation with a ship, being a mere licensee or invitee, and who is injured through failure of ship to provide a proper gangplank, is prevented by his contributory negligence from recovery in an action brought at law, or is entitled to an apportionment of damages.

STATEMENT

Johnson was injured by falling off a gangplank stretched between two vessels then lying in navigable waters at Jacksonville, as he was attempting to pass from one vessel to the other. He brought an action at law in the Supreme Court of the State of New York which was removed to the District Court of the United States for the Eastern District of New York. His complaint stated his status in relation to the vessels as follows (R. 4):

> That on or about the 1st of August, 1920, the Steamship *Jacksonville* was lying at the port of Jacksonville, Florida. That on or about that day, the plaintiff was invited by the boatswain of the Steamship *Jacksonville* to go on board the said vessel in order to procure or attempt to procure employment as a member of the crew of that vessel.

While leaving the vessel he fell in the water, sustaining his injuries. He had no contractual relation with the ship. The conclusive testimony is (Johnson, R. 53):

Q. Did you get a job on board the *Jacksonville* that day?

A. No.

Q. You never had a job on the *Jacksonville?*

A. No.

Q. Never were hired?

A. No.

Q. Never were employed on it?

A. No.

Q. You went on of your own accord—your own business?

A. With the boatswain to hire.

Q. You went on looking for a job?

A. Yes, sir.?

Q. You went on to get something for yourself, a job?

A. Yes, sir.

Q. You were out of a job at the time, weren't you?

A. Yes.

He was a licensee or invitee.

The sole question present is whether, being a licensee or invitee, his contributory negligence in an action at law bars recovery or requires an apportionment of the damages. The District Judge (Campbell, D. J.) regarded Johnson a licensee on the vessel (R. 210) and the Circuit Court of Appeals classes him an invitee (R. 223). Both courts held contributory negligence barred recovery whether he was considered a licensee or an invitee. The trial court charged the jury that the plaintiff

could not recover if guilty of contributory negligence (R. 200), and the jury found for the defendant.

The application made to this Court now suggests that Johnson is to be classed as a seaman, and the admiralty rule which apportions damages where there is contributory negligence should be applied.

ARGUMENT

Had petitioner had a contractual relation as seaman or stevedore with the ship, contributory negligence in a law action would not bar recovery but require an apportionment of the damages under the ruling of this Court in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, or under the provisions of the Jones Act (U. S. C. Title 46, Section 688). However, in the absence of such contractual relation, irrespective of the locality of the tort, contributory negligence is complete defense, and apportionment must be denied. The best statement or summary is made by Benedict's Admiralty (5th Ed., pp. 32, 33):

> Apart at least from an Act of Congress—and to avoid a question of its constitutionality, this will be construed if possible to intend a uniform rule at law and in admiralty—*the substantive rights conferred by maritime law must be recognized equally in an action brought at common law, whether in Federal or State courts, upon maritime contract or even for tort, where there is a contractual relation between the parties so that*

the contract contemplates the application of the maritime law to the breach of duty and the maritime law prescribes the measure of recovery and the apportionment of damages in case of contributory negligence. In the case of stevedores, though it has been said that even in admiralty the employer's liability is determined upon common law principles, the maritime rule that contributory negligence goes only to the reduction of damages must be applied in an action at law against the employer.

In actions in tort *between parties having no contractual relation the common law courts apply their own rules respecting the amount of recovery and the effect of contributory negligence.* Thus, in collision cases, the common law court applies the common law rule that joint fault bars recovery instead of the maritime rule of divided damages.[1] There is therefore a distinction between cases involving contractual relation and cases of simple tort independent of such relation. In cases of contractual relation even though of tortious injury, as there is but one contract, its effect should be the same in all courts and the measure and conditions of recovery which the contract contemplates should be applied alike at law and in ad-

[1] See *Belden* v. *Chase*, 150 U. S. 674; *Atlee* v. *Packet Co.*, 21 Wall. 389; *Swanson* v. *Luckenbach S. S. Co., Inc.*, (C. C. A. 9th Cir.) 17 F. (2d) 735; *The Sudbury* (D. C. Oregon), 14 F. (2d) 533; *John A. Roebling's Sons Co.* v. *Erickson*, 261 Fed. 986.

> miralty. *In cases, however, where there is no relation between the parties but that one has inflicted and the other sustained injury,* the courts have not to consider what obligation their contract contemplated but only what redress justice requires and *different courts may follow variant notions of what is* just. (Italics ours.)

The Act referred to was the Jones Act, the constitutionality of which lately was settled by this Court in *Panama Railroad Company* v. *Johnson,* 264 U. S. 375. The application of that Act rests upon the relation of employer and employee, as the general rule requires. The wording is:

> Any seaman who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in the case of personal injury to railway employees shall apply; * * *. (Italics ours.)

The examination of each case cited by the petition definitely establishes that the admiralty rule for apportionment of damages in tort matters applies only where there is a contractual relation, such as seaman or stevedore, existing between the person injured and the owner of the vessel or other defendant in suit. In this analysis it thus follows that the ruling of both lower courts was correct and

the present application is without merit. The petition should be denied.

Respectfully submitted,

WILLIAM D. MITCHELL,
Solicitor General,
GEORGE R. FARNUM,
Assistant Attorney General,
CHAUNCEY G. PARKER,
General Counsel, United States Shipping Board,
J. FRANK STALEY,
Attorneys for the United States.

AUGUST, 1928.

○

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CHARLES ELMORE

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No. [redacted] 5

In the Supreme Court of the United States

OCTOBER TERM, 1928

JOHN JOHNSON, PETITIONER

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FLEET CORPORATION

U.S. GOVERNMENT PRINTING OFFICE : 1929

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In the Supreme Court of the United States

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No. 220

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UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FLEET CORPORATION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 185) is reported in 24 F. (2d) 963. The charge to the jury by the District Judge appears at pages 167–178 of the Record.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered March 26, 1928. (R. 185.) Petition for certiorari was filed on June 22, 1928, and granted October 3, 1928.

THE QUESTIONS PRESENTED

1. Whether one who has no contractual relation with a ship, being a mere licensee or invitee, and

who is injured through failure of ship to provide a proper gangplank is prevented by his contributory negligence from recovery in an action brought at law, or is entitled under the rule in admiralty to an apportionment of damages.

2. Whether, if the admiralty rule applies, the action is barred because not brought within the two-year limitation period within which an action in admiralty could have been prosecuted.

STATUTES INVOLVED

Section 5 of the Suits in Admiralty Act (c. 95, 41 Stat. 525, U. S. C. Title 46, Sec. 745), which provides an exclusive remedy in admiralty against the Fleet Corporation, fixes a limitation period of two years. (*United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.)

> * * * all other suits hereunder shall be brought within two years after the cause of action arises.

Section 33 of the Merchant Marine Act of 1920 (c. 250, 41 Stat. 988, 1007; U. S. C. Title 46, Sec. 688) provides:

> That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> "SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all stat-

utes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65; U. S. C. Title 45, Sec. 56), by Section 6, provides:

> No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Section 24 of the Judicial Code as amended (U. S. C. Title 28, Sec. 41, par. 3) provides:

> Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United

> States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize: *Provided,* That the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any State, District, Territory, or possession of the United States.

Section 256 of the Judicial Code as amended (U. S. C. Title 28, Sec. 371, par. 3) provides:

> Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States.

STATEMENT

Johnson was injured by falling off a gangplank stretched between two vessels owned by the United States then lying in navigable waters at Jacksonville, as he was attempting to pass from one vessel to the other. As locality is the sole test for deter-

mining jurisdiction in admiralty for tort losses, a libel in admiralty could have been maintained against the vessel or her owners to recover for his losses. However, he brought an action at law against the Fleet Corporation in the Supreme Court of the State of New York which was removed to the District Court of the United States for the Eastern District of New York. His complaint stated his status in relation to the vessels as follows (R. 3):

> That on or about the 1st of August, 1920, the Steamship *Jacksonville* was lying at the port of Jacksonville, Florida. That on or about that day, the plaintiff was invited by the boatswain of the Steamship *Jacksonville* to go on board the said vessel in order to procure or attempt to procure employment as a member of the crew of that vessel.

Johnson claims he went to look after a job as ship carpenter, but the vessel then had a ship carpenter. (R. 142.) There is evidence he had been drinking (R. 134), although this is denied. While leaving the vessel he fell in the water, sustaining his injuries. He had no contractual relation with the ship. The conclusive testimony is (Johnson, R. 42):

> Q. Did you get a job on board the *Jacksonville* that day?
>
> A. No.
>
> Q. You never had a job on the *Jacksonville*?
>
> A. No.

Q. Never were hired?

A. No.

Q. Never were employed on it?

A. No.

Q. You went on of your own accord—your own business?

A. With the boatswain to hire.

Q. You went on looking for a job?

A. Yes, sir.

Q. You went on to get something for yourself, a job?

A. Yes, sir.

Q. You were out of a job at the time, weren't you?

A. Yes.

The gangplank from which Johnson fell had been in use before and afterwards by the ship's crew (about 40) and shipyard employees (about 40) engaged in making repairs aboard the vessel (R. 120, 135, 136). The accident happened on August 1, 1920. The suit at law was begun March 29, 1923 (R. 2).

Johnson had no contractual relation with the ship or her owners. He was a licensee or an invitee. The District Judge left it to the jury to say which he was. (R. 172.) The Circuit Court of Appeals held Johnson was an invitee. (R. 185.)

The trial court charged the jury that contributory negligence of the plaintiff would bar recovery. The jury found for the defendant. The Circuit Court of Appeals affirmed per curiam on the authority of *Belden* v. *Chase,* 150 U. S. 674; *Atlee* v.

Packet Co., 21 Wall. 389, and *Maleeney* v. *Standard Shipbuilding Company*, 237 N. Y. 250. (R. 185.)

The application for certiorari which this Court granted suggested Johnson is to be classed as a seaman and his rights determined by the maritime law, which apportions damages although the seaman may be guilty of contributory negligence (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372).

SUMMARY OF THE ARGUMENT

1. Under the rule stated in the cases of *Belden* v. *Chase* and *Atlee* v. *Packet Co.* (*supra*), which have not been expressly overruled by this Court, contributory negligence bars Johnson's right to recovery in a common law action. Had Johnson been employed as a seaman, his rights would have been ascertained by maritime rules, as his employment or contract would have been maritime and have a direct relation to commerce and navigation in its international and interstate relation. Johnson was not employed as a seaman nor did he have any contractual relations with the ship or her owners. The accident happened on navigable waters, which fact alone gave him the election to proceed in admiralty. His accident is one of *local concern* and common law principles of liability control.

2. Even assuming his rights are to be determined by maritime law, as such rights must be asserted in admiralty within two years after they arose, and as this action was brought more than two years afterward, the action is barred.

3. As this action is against the Fleet Corporation whose relation to the vessels involved is as a public agent of the United States, and as the loss happened through the negligence of the officers and crew of Government vessels, the action can not be maintained against the Fleet Corporation, as a public agent is not responsible for the negligence of subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.

ARGUMENT

I

It is admitted that Johnson could have brought an action in admiralty, as the injuries were sustained upon navigable waters. Locality is the test. He did not elect to do so but brought his action at common law. Admittedly, as he was guilty of contributory negligence, if the rule in *Belden* v. *Chase*, 150 U. S. 674, and *Atlee* v. *Packet Co.*, 21 Wall. 389, still is law, the ruling of both lower courts was correct. That rule is:

> But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages.

> In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.
>
> It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially. (*Atlee* v. *Packet Co.*, 21 Wall. 395.)

Our exhaustive research of the cases in this Court since those cases suggests that this Court since has not been asked to apply maritime principles and rules in common law tort actions, which, apart from the mere circumstance of locality, involved no contractual relation, or were in no respect maritime. In every case where the exclusive feature of the

maritime law has been applied to common law actions and to state legislation, in addition to the circumstance of locality, there has been a maritime contractual relation between the injured party and the vessel or her owners and the work upon which the injured party was engaged was maritime in its nature. It had direct relation to commerce and navigation. It is to be conceded, we believe, that these factors are not present in this case. Johnson was a licensee or invitee. He had no contractual relation to the ship; he was not engaged in a maritime employment when injured. As he was not a seaman, he could not claim the benefits of the various seamen's acts nor secure relief under the Jones Act.

The passage of Workmen's Compensation legislation by the States has led to a new development of the doctrine of uniformity in the application of maritime law. The need of uniformity was invoked to deny the application of State statutes to maritime injuries and has been extended to common law actions involving injuries happening upon navigable waters to seamen, stevedores, ship repairmen, then employed in maritime service and having a contractual relation directly or indirectly with the vessel involved.

Southern Pacific Co. v. *Jensen* (Stevedore), 244 U. S. 205.

Chelentis v. *Luckenbach S. S. Co.* (Seaman), 247 U. S. 372.

Knickerbocker Ice Co. v. *Stewart* (Bargeman), 253 U. S. 149.

Western Fuel Co. v. *Garcia* (Stevedore), 257 U. S. 233.

Grant Smith-Porter Co. v. *Rhode* (Carpenter at work on uncompleted ship), 257 U. S. 469.

State Industrial Commission of the State of New York v. *Nordenholt Corp.* (Longshoreman), 259 U. S. 263.

Carlisle Packing Co. v. *Sandanger* (Seaman), 259 U. S. 255.

Great Lakes Dredge & Dock Co. v. *Kierejewski* (Ship repairman), 261 U. S. 479.

State of Washington v. *W. C. Dawson & Co.* (Stevedore), 264 U. S. 219.

Robins Drydock & Repair Co. v. *Dahl* (Ship repairman), 266 U. S. 449.

Union Fish Co. v. *Erickson* (Master's contract), 248 U. S. 308.

Smith and Son v. *Taylor* (Stevedore), 276 U. S. 179.

Northern Coal & Dock Co. v. *Strand* (Stevedore), No. 41, October Term, 1928. Decided Dec. 10, 1928, unreported.

The review of these cases suggests these deductions.

The rule is stated:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and

> uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself * * *. (*Southern Pacific Co.* v. *Jensen,* 244 U. S. 216.)

The matters in controversy there are determined to be of general rather than local concern. As matters of general concern, the rights of the parties are dependent solely upon the maritime law. It is recognized that uniformity is not required throughout the entire field of admiralty jurisdiction but only as to the characteristic features of the general maritime law in its essential international and interstate relations. Where, however, the tort is purely of local concern, state statutes and the rule of common law courts apply because they "do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." (*Sultan Railway Co.* v. *Department of Labor,* 277 U. S. 135.)

Additional recent cases applying the local rule are:

Alaska Packers Assoc. v. *Accdt. Comm.,* 276 U. S. 467.

Millers' Underwriters v. *Braud,* 270 U. S. 59.

Grant Smith-Porter Ship Co. v. *Rhode,* 257 U. S. 469.

Daniel Toland's case, 1927 A. M. C. 887.

Eclipse Mills Co. v. *Dept. of Labor,* affirmed under name of *Sultan Railway Co.* v. *Dept. of Labor, supra,* 1927 A. M. C. 432.

This latter rule is controlling here. There is no contractual relation, maritime or otherwise, between Johnson and the ship and/or her owners. Therefore, he was not entitled to maintenance and cure which his maritime contract of seaman would entitle him to. He has no benefits under the various Seamen's Acts, including the Jones Act. He was only a seaman by vocation. His passage to and from a vessel looking for employment is a matter of his personal concern. We do not understand upon what theory the conclusion could be stated that to apply the common law rules of liability to an accident of a local nature such as this necessarily would work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international and interstate relations, which is the reason for the general doctrine.

With respect to maritime torts where there is no contractual relation and/or which are to be characterized as local in kind, the common law rule applies as stated in *Belden* v. *Chase; Atlee* v. *Packet Co., supra,* and the ruling of the Circuit Court of Appeals is correct.

The rule is thus stated in Benedict's Admiralty (5th Ed. pp. 32, 33):

> Apart at least from an Act of Congress—and to avoid a question of its constitutional-

ity, this will be construed if possible to intend a uniform rule at law and in admiralty—the substantive rights conferred by maritime law must be recognized equally in an action brought at common law, whether in Federal or State courts, upon maritime contract or even for tort, where there is a contractual relation between the parties so that the contract contemplates the application of the maritime law to the breach of duty and the maritime law prescribes the measure of recovery and the apportionment of damages in case of contributory negligence. In the case of stevedores, though it has been said that even in admiralty the employer's liability is determined upon common law principles, the maritime rule that contributory negligence goes only to the reduction of damages must be applied in an action at law against the employer.

In actions in tort between parties having no contractual relation the common law courts apply their own rules respecting the amount of recovery and the effect of contributory negligence. Thus, in collision cases, the common law court applies the common law rule that joint fault bars recovery instead of the maritime rule of divided damages. There is therefore a distinction between cases involving contractual relation and cases of simple tort independent of such relation. In cases of contractual relation even though of tortious injury, as there is but one contract, its effect should be the same

> in all courts and the measure and conditions of recovery which the contract contemplates should be applied alike at law and in admiralty. In cases, however, where there is no relation between the parties but that one has inflicted and the other sustained injury, the courts have not to consider what obligation their contract contemplated but only what redress justice requires and different courts may follow variant notions of what is just.

II

Assuming Johnson's rights are to be measured by the maritime law, this action is barred upon limitation grounds because not brought within two years. The accident happened August 1, 1920, and his action was not begun until March 29, 1923. The proceeding is against the Fleet Corporation. Its answer properly pleads limitation. (R. 6.) This Court has definitely ruled that the Suits in Admiralty Act (*supra*) which fixes the two year limitation period provides the exclusive remedy in admiralty against the Corporation. (*Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.) If Johnson had had a contractual relation as seaman with the vessel, his rights (and the rights of stevedores and ship repairman are to be measured accordingly) would have been measured by the provisions of the Jones Act, which requires suit to be brought within two years. The Jones Act incorporates the terms of the

Federal Employers' Liability Act (*supra*) which by Section 5 fixes the two year limitation period. *Northern Coal and Dock Company* v. *Strand* (October Term, 1928, No. 41) decided by this Court December 10, 1928. The converse has been definitely ruled by this Court which has applied to admiralty actions for death, based upon State statutes, the limitation periods fixed by such statutes (*Western Fuel Co.* v. *Garcia,* 257 U. S. 233). This Court said (p. 242):

> It is admitted that under the circumstances here presented suit against petitioner, if instituted in a court of that State, would have been barred, and we are of opinion that the same limitation must be enforced in respect of the admiralty proceeding * * *.
>
> "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all * * *."

The time within which the action would have been brought either under authority of the Suits in Admiralty Act or under the Jones Act is a limitation of the liability itself and not of the remedy alone. The period of time within which an action may be commenced is a material element in (such) uniformity of operation. *Engel* v. *Davenport,* 271 U. S. 33, 39.

It follows the action brought at law must be dismissed upon limitation grounds.

III

The vessels involved are owned and operated by the United States in execution of the purpose specified in Sections 1 and 12 of the Merchant Marine Act of June 5, 1920 (c. 250, 41 Stat. 988, U. S. C., Title 46, Secs. 861, 871).[1] The answer (R. 5) pleads that the United States owned the *Jackson-*

[1] SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.

ville and that the Fleet Corporation did not own or operate the vessel and the proceedings were barred by the Suits in Admiralty Act which provided an exclusive remedy and the limitation clause of which Act barred any proceeding at law. At the trial (R. 68), the operating agreement showing the Fleet Corporation's relation to the vessel was offered in evidence but it is not printed in the record. However, it has been definitely ruled by this Court that the services of the Corporation with respect to the operation of Government merchant vessels were obviously of a public nature and conducted on behalf of the United States. In *Emergency Fleet Corporation* v. *Western Union,* 275 U. S., at page 422, it is stated:

> But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

The vessels here involved are owned and operated by the United States in execution of the purpose specified in Sections 1 and 12 of the Merchant Ma-

rine Act (*supra*), and the operation is to be declared a function of Government. (*The Pesaro,* 271 U. S. 562.) The Fleet Corporation is declared to be a public agent. As the Fleet Corporation can not be held for the default or negligent acts of its subagents or the master or crew of Government-operated vessels, its exemption from liability falls squarely within the rule announced in *Robertson* v. *Sichel,* 127 U. S. 507, 515:

> A public * * * agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, 319.

This rule is the basis of similar decisions in *Hodgson* v. *Dexter,* 1 Cranch 345; *Parks* v. *Ross,* 11 How. 362; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453, as applied to contractual obligations. The Masters and seamen who are responsible for the safety of the gangplank employed upon Government vessels are employees of the Government (34 Op. A. G. 363). If an actionable wrong was committed, liability rests with the Government. The Government is responsible to pay judgments entered against the Fleet Corporation. Proceedings against the Fleet Corporation are in substance and effect actions against the Government under the doctrine of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and *Wells* v. *Roper,* 246 U. S. 335.

The Suits in Admiralty Act refers to corporations all of the stock of which is owned by the United States, and in Section 2 provides that "a libel in personam may be brought against the United States or against such corporation, as the case may be."

This provision contemplating suits against the Fleet Corporation was no doubt intended to cover cases where the Fleet Corporation, acting in its corporate capacity and interest, and in its own name, incurred obligations as in *Sloan Shipyards Corp.* v. *Fleet Corporation,* 258 U. S. 549, and not a case like this where the Fleet Corporation has acted as agent for the United States.

As the Fleet Corporation in the matters here involved was a public agent, and the alleged accident resulted from negligent acts of the officers or crew of a Government vessel, recovery can not be had against the Fleet Corporation in the present action. Recovery can be had only by authority of the Suits in Admiralty Act.

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FEBRUARY, 1929.

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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1929

JOHN JOHNSON, PETITIONER

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FLEET CORPORATION ON REARGUMENT

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BRIEF FOR THE FLEET CORPORATION ON REARGUMENT

This cause, which is before this Court on a writ of certiorari, was argued at the last term and restored to the docket for reargument and set down for hearing with No. 32, *United States Shipping Board Merchant Fleet Corporation* v. *Lustgarten* (the two cases to be argued as one). Argument was specially invited on the following questions:

1. Is the United States Shipping Board Merchant Fleet Corporation, as an agency of the United States, immune from suit for the tortious acts of persons whom it has employed to carry on the operation of merchant vessels of the United

States, and who have been selected by it with due care?

2. Are the remedies given against the United States Shipping Board Emergency Fleet Corporation by the Suits in Admiralty Act of March 9, 1920, exclusive of all other remedies, whether at law or in admiralty, for liabilities of the Fleet Corporation growing out of the operation of merchant vessels of the United States?

3. Is the two-year period of limitation prescribed in the Suits in Admiralty Act applicable to the present suit?

THE STATUTES INVOLVED

The pertinent provisions of the statutes involved—the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 993, 1007 (U. S. C., Title 46, Secs. 861, 871, 886), and the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525–528 (U. S. C., Title 46, Secs. 741 et seq.)—are copied on pages 3 to 10 of the brief for petitioners in the *Lustgarten case,* No. 32.

STATEMENT

The petitioner brought an action in the Supreme Court of the State of New York on March 29, 1923. (R. 2.) The only defendant was the Fleet Corporation. (R. 2–3.) The cause was removed to the United States District Court for the Eastern District of New York, and was tried before a jury, which rendered a verdict for the defendant. (R. 178.)

The complaint alleged, and there was evidence tending to show, that on August 1, 1920, the petitioner, Johnson, sustained injuries from falling off a gangplank stretched between two vessels lying at the port of Jacksonville, Florida. (R. 3, 9–12.) There was also evidence tending to show that Johnson had gone on to one of these vessels, the S. S. *Jacksonville,* at the invitation of the boatswain to see the chief officer in order to obtain employment as a member of the crew. (R. 9.)

The complaint alleged that "the defendant owned, operated, managed, and controlled an American merchant vessel known as the S. S. *Jacksonville.*" (R. 3.) The answer of the defendant denied this allegation and alleged that the *Jacksonville* was a "merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America." (R. 4.) Counsel for the defendant refused to stipulate that the Fleet Corporation was operating the ship, "because it was not." (R. 56.) The transcript of record in this Court seems to contain no evidence to support the allegations of the complaint. Copies of the pay roll of the *Jacksonville,* covering the period from July 30th to August 5th, 1920, and of the contract under which the vessel was operated were introduced in evidence. (R. 56, 68.) Nothing, however, appears in the record as to the contents of these exhibits. We contend that these exhibits, if considered, show that the Fleet Corporation acted only as agent of the

United States. The charge of the trial judge to the jury did not mention this point. (R. 167–177.)

The issues which the trial court left to the jury were whether there was negligence in the construction of the gangplank; whether Johnson was guilty of contributory negligence; and whether he was a mere licensee or an invitee. The court charged the jury that if Johnson was "guilty of contributory negligence then he could not recover." (R. 171.)

The counsel for the plaintiff requested that the court "charge the jury the rules on the question of contributory negligence as to this maritime law," and took an exception to the court's refusal to do so. (R. 178.) This was assigned as error in assignment of errors which were argued before the Circuit Court of Appeals. (R. 181.) That court held that contributory negligence was an absolute bar to recovery. (R. 185.)

The defendant's answer pleaded in bar of the plaintiff's recovery that any remedy which the plaintiff might have was founded exclusively upon the Suits in Admiralty Act and that the action was barred because not brought in two years. (R. 5, 6.) The record does not show any decision or discussion of this matter by either of the courts below, but obviously the District Court must have overruled both of these defenses.

SUMMARY OF ARGUMENT

1. No connection of the Fleet Corporation with the vessel is shown except what appears by an

agreement for operation of the vessel and statutes. The Fleet Corporation made the operating agreement only as an agent for the United States of America. There is no evidence that the crew were not selected with due care. On these assumptions, the Fleet Corporation has complete defenses in that it did not owe Johnson the duty for neglect of which he sued and also that it was the agent of the United States performing a public function. The Merchant Marine Act of 1920 in substance declares the operation of merchant vessels of the Shipping Board to be a function of Government and expressly directs that "the Fleet Corporation shall continue in existence and have authority to operate vessels." Since the passage of this Act the Fleet Corporation has been the agency through which the Shipping Board has performed its principal functions, and Congress has made annual appropriations for the maintenance and operation of Shipping Board vessels and for the expenses of the Fleet Corporation. The Suits in Admiralty Act provides that any final judgment rendered in any suit authorized by that Act, even though brought against the Fleet Corporation, shall be paid out of the Treasury of the United States. A public agent is not responsible for omissions of duty of servants properly employed by him or it in the discharge of his or its official duties.

2. No action at law lies against the Fleet Corporation for the tort complained of in the instant

case, as the remedy given by the Suits in Admiralty Act is exclusive of all other remedies against the Fleet Corporation on all causes of action arising out of the operation of merchant vessels owned by the United States for which a proceeding in admiralty could be maintained if the vessel were privately owned. Johnson had a remedy in admiralty for the tort complained of (if he had any right of action against the Fleet Corporation), but he brought an action at law. This Court has held in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, that the Suits in Admiralty Act furnishes the exclusive remedy in admiralty against the United States and the Fleet Corporation on all maritime causes of action arising out of the possession or operation of merchant vessels owned by the Government. Although it has refrained from expressing an opinion on the precise question raised here, the considerations which led to the decision in the *Rosenberg case* would seem to apply equally to actions at law for maritime torts. If the Act is to provide a uniform system for administration of actions arising out of the operation of Government merchant vessels, the same procedure and the same period of limitation must apply to all proceedings. Where Congress has undertaken to regulate a whole subject, its legislation necessarily is exclusive and the statutory remedy bars an action at common law which might have been brought but for such legislation.

Section 18 of the Merchant Marine Act of June 5, 1920, has no application to the points made in either of the two preceding paragraphs. The contention that Congress could not prevent resort to a common law action for a maritime tort is also unsound. In cases to which the admiralty jurisdiction extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. Congress may also regulate and restrict actions against the United States and its agents.

3. It may be argued that even if the Suits in Admiralty Act is held not to furnish the exclusive remedy for the liability of the Fleet Corporation in the instant case, nevertheless the two-year period of limitation prescribed in that Act is applicable to the present suit, but we believe that the better view is that that limitation period is not applicable unless the Suits in Admiralty Act does furnish the exclusive remedy. If this conclusion is sound, it furnishes a strong ground in holding that the Suits in Admiralty Act does furnish the exclusive remedy.

4. The defenses argued above are properly before this Court. They were raised by the defendant's answer to the complaint. Moreover, the defense of the exclusiveness of the remedy under the Suits in Admiralty Act goes to the jurisdiction of the District Court, and consequently may be raised at any time.

5. Under the rule stated in the cases of *Belden* v. *Chase*, 150 U. S. 674, and *Atlee* v. *Packet Co.*, 21

Wall. 389, which have not been expressly overruled by this Court, contributory negligence bars Johnson's right to recovery in a common law action.

ARGUMENT

I

THE FLEET CORPORATION, AS AN AGENT OF THE UNITED STATES, IS NOT LIABLE FOR THE TORTIOUS ACTS OF PERSONS WHOM IT HAS EMPLOYED TO CARRY ON THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES AND WHO HAVE BEEN SELECTED BY IT WITH DUE CARE

As we have pointed out above, the printed record which is before this Court is barren as to the relationship of the Fleet Corporation to the vessel. (P. 3, *supra*).

Counsel for defendant at the conclusion of the evidence moved to dismiss the complaint "on the ground that the plaintiff has failed to establish facts sufficient to constitute a cause of action against the defendant and on the ground that he has failed to show any negligence on the part of the defendant." (R. 167.)

We contend that it is not shown that the Fleet Corporation owed Johnson the duty for neglect of which he sued. (See pp. 17–18 of the brief for the petitioners in the *Lustgarten case.*)

The operating agreement (introduced in evidence as Plaintiff's Exhibit 11 (R. 68), but not copied in the record before this Court) is similar to, although not in the identical form of, the contract involved in the *Lustgarten case* which is con-

sidered on pages 18 to 26 of brief for petitioners in the *Lustgarten case*. In making both contracts the Fleet Corporation acted only as agent of the United States.

There is no evidence that the crew were not selected with due care.

Our argument on the question of public agency is substantially identical with that made in Point II, pages 26 to 30 of brief for petitioners in the *Lustgarten case*. In the instant case the operating agent is not a party and consequently only the Fleet Corporation is to be considered.

See also page 7 of brief for the Fleet Corporation in the *Royal Insurance Co. case,* No. 123, October Term, 1929.

The brief filed in behalf of Johnson and Lustgarten contends that the Fleet Corporation is liable for the tortious acts of members of the crews of vessels owned by the Government. In view of our argument in the brief for petitioners in the *Lustgarten case,* it seems unnecessary to answer in detail the arguments in our opponent's brief. One argument which our brief in the *Lustgarten case* does not cover is based upon the reenactment of Section 9 of the Shipping Act of 1916, by Section 18 of the Merchant Marine Act of June 5, 1920. But we submit that this section has no bearing whatever upon this point. It did not, of course, repeal the Suits in Admiralty Act, Section 8 of which provides that final judgments in suits against the Fleet Corpora-

tion under that Act shall be paid out of the Treasury. The introductory recital in the Merchant Marine Act of June 5, 1920, itself shows that it was contemplated that the temporary operation of the merchant vessels should be a function of the Government, and Section 12 of the Act provides:

> That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act.

Section 18 of that Act, reenacting Section 9 of the Shipping Act of 1916, does not purport to modify any rule of law applicable to public agents or in any way refer to the Fleet Corporation.

II

THE REMEDIES GIVEN AGAINST THE FLEET CORPORATION BY THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1920, ARE EXCLUSIVE OF ALL OTHER REMEDIES, WHETHER AT LAW OR IN ADMIRALTY, FOR LIABILITIES OF THE FLEET CORPORATION GROWING OUT OF THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES

The cause of action upon which Johnson sued occurred on August 1, 1920. (R. 5, 9–12.) The

action was not brought until March 29, 1923. (R. 2.) The question of the statute of limitation is consequently involved. We submit that the remedy in admiralty given by the Suits in Admiralty Act was the exclusive remedy of any kind which was open to Johnson. This point was expressly raised in the defendant's answer. (R. 4–5.) Johnson might have pursued that remedy, but he did not. The action which he brought was in the State court (R. 2), and the trial was before a jury in the Federal court to which the case was removed. (R. 178.)

The argument under this point in this case is set forth in pages 31 to 39 of brief for petitioners in the *Lustgarten case*. No question in regard to the Jones Act is involved in the instant case, as Johnson was not a seaman who was suing his employer, but according to his own testimony he was leaving the vessel on which he had gone to look for work at the suggestion of the boatswain. (R. 42.)

The brief of Johnson and Lustgarten on this point also relies on Section 18 of the Merchant Marine Act of June 5, 1920, and states that that section shows "a continuing intention to place the Fleet Corporation * * * on the same general basis as private shipping companies operating private merchant vessels." The conclusive answer to this is that Section 18 does not mention the Fleet Corporation or in any way refer to it. This is in marked contrast to other parts of the Merchant Marine Act, which expressly mention the Fleet Corporation,

and the provisions of the Suits in Admiralty Act which refer to "any corporation in which the United States or its representatives shall own the entire outstanding capital stock." It is clear that Section 18 was not intended to modify the Suits in Admiralty Act or restrict its operation. Otherwise, it would have had the effect of permitting the seizure of vessels owned by the Government and of giving remedies against the United States and the Fleet Corporation in admiralty other than those prescribed in the Suits in Admiralty Act.

The brief of Johnson and Lustgarten contends that "Congress has no right to declare that a citizen shall be deprived of a common law action and the right of trial by jury which he has concurrently with the remedy *in personam* in Admiralty against the Fleet Corporation by declaring that he must proceed, if at all, only in admiralty and without right of trial by jury." We submit that this is unsound, as is also the assertion that "In saving the common law remedy of 1789, Congress saved it because it could not or deemed it could not have taken it away." The Constitution provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction" and contains no reservation of common law remedies. (Art. III, sec. 2) As this Court said in *The Moses Taylor*, 4 Wall. 411, 429:

> the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases un-

> avoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. * * *

In *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 386, 390, this Court said in a discussion of the maritime law:

> After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several States, but as having become the law of the United States,—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. * * *
>
> * * * * *
>
> The course of legislation, as exemplified in § 9 of the Judiciary Act of 1789, §§ 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and §§ 24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the

adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace.

Moreover, the Suits in Admiralty Act applies only to cases against the United States or a corporation in which the United States or its representatives own the entire outstanding capital stock. We submit that there can be no question as to the power of Congress to change and restrict the remedies against the United States or corporations in which it is so vitally interested.

At the time of the passage of the Judiciary Act of 1789 and the adoption of the Seventh Amendment, there certainly was no right to any jury trial against the United States or against any corporation in which it owned the entire capital stock, and consequently neither the provisions of the "saving" clause or of the "trial by jury" clause have any application to cases against the United States or such corporations.

III

IS THE TWO-YEAR PERIOD OF LIMITATION PRESCRIBED IN THE SUITS IN ADMIRALTY ACT APPLICABLE TO THE PRESENT SUIT?

The following argument may be made in support of the contention that even if the remedy given by the Suits in Admiralty Act is not exclusive, nevertheless the two-year period of limitation prescribed in that Act is applicable:

Johnson insists that in his action at law he is entitled to the benefit of the maritime law allowing a division of damages where both parties are guilty of negligence. If his position is sound, it must be based upon the principle "that rights and liabilities in respect to torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted." See *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 241. If the principle of uniformity is broad enough to require an application of the admiralty rule of the division of damages, the same principle would seem to require uniformity in the time fixed for bringing suit on claims growing out of the operation of merchant vessels owned by the Government. What uniformity is there if the limitation which Congress placed upon bringing suit in the District Court in admiralty proceedings can be disregarded in another form of action tried in the United States District Court on the same cause of action? If the restriction is desirable and necessary for one class of cases, it is desirable and necessary for every class of cases. Somewhat analogous situations were presented in *Phillips* v. *Grand Trunk Railway Co.,* 236 U. S. 662, *Kansas City Southern Railway Co.* v. *Wolf,* 261 U. S. 133, *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, *supra,* and in *Engel* v. *Davenport,* 271 U. S. 33, 39.

We are of the opinion, however, that as the limitation provision (Sec. 5) of the Act provides that

all suits "hereunder" (with an exception not here material) are to be "brought within two years after the cause of action arises," it does not apply to suits not brought "hereunder." If this is so, it is a strong reason for holding that the Act prohibits resort to any action at law on causes of action covered by the Act.

IV

THE DEFENSES ARGUED ABOVE ARE PROPERLY BEFORE THIS COURT

Johnson's brief filed in this Court contends that none of these defenses are properly before this Court for argument. On pp. 52–53 it states:

> If at the time the injuries occurred in these two cases it was acting in the capacity of a public agent of the United States, that was a matter of fact for the Fleet Corporation to prove and it has not done so. [*Fleet Corporation* v. *Sullivan*, 261 U. S. 146 (1922).] The court is simply limited by the record.

Paragraph "Second" of the complaint alleges that "the defendant owned, operated, managed, and controlled" the S. S. *Jacksonville*. (R. 3.) This allegation was denied by the answer. (R. 4.) Moreover, as a complete defense the answer alleged that the *Jacksonville* belonged to the United States, and that the action is in effect a suit against the United States, and whatever rights the plaintiff had are founded on the Suits in Admiralty Act. The answer also averred as a complete defense that the

Fleet Corporation did not own the vessel or control it under charter, and as another complete defense, that the action was not begun until more than two years after the cause of action arose. (R. 4–6.)

No testimony was introduced tending to show that the vessel was owned or operated by the Fleet Corporation. The only evidence on the point was the agency agreement for the operation of the vessel. (Plaintiff's Exhibit 11, R. 68.)

At the conclusion of the testimony, counsel for the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to establish "facts sufficient to constitue a cause of action against the defendant and on the ground that he has failed to show any negligence on the part of the defendant." The motion was denied and the defendant was given an exception. (R. 167.)

The defense of the exclusiveness of the remedy under the Suits in Admiralty Act goes to the jurisdiction of the District Court, and consequently may be raised at any time. See *Nassau Smelting Works* v. *United States,* 266 U. S. 101, 106.

V

THE COURTS BELOW WERE CORRECT IN HOLDING THAT IF JOHNSON WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IT BARRED HIS RIGHT TO RECOVER IN THE LAW ACTION WHICH HE BROUGHT

We do not wish to abandon this point, on which the Circuit Court of Appeals decided the case, and unless this Court has already decided it against us,

we refer to the argument under Point I, pages 8 to 15 of the brief for the Fleet Corporation filed at the hearing in the instant case last term, No. 220, October Term, 1928.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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NOVEMBER, 1929.

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FILE COPY

JAN 31 1930

Supreme Court of the United States.

OCTOBER TERM, 1929.

Nos. 5, 32, 56 and 123.

JOHN JOHNSON, Petitioner,

5 *against*

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, Sued in the Name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC., Petitioners,

32 *against*

BENJAMIN LUSTGARTEN, an Infant, by His Guardian, *ad Litem*, JOHN A. LYDECKER,

FEDERAL SUGAR COMPANY, LTD., *et al.*, Petitioners,

56 *against*

THE UNITED STATES OF AMERICA.

ROYAL INSURANCE COMPANY, LTD., *et al.*, Petitioners,

123 *against*

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR A REHEARING OF JOHN JOHNSON, PETITIONER, AND BENJAMIN LUSTGARTEN, RESPONDENT, AND OF SEVEN ATTORNEYS AS *AMICI CURIÆ*.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States.

Nos. 5, 32, 56 and 123. October Term, 1929.

John Johnson, Petitioner,

5 vs.

United States Shipping Board Emergency Fleet Corporation,

United States Shipping Board Merchant Fleet Corporation, Sued in the Name of the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, Inc., Petitioners,

32 vs.

Benjamin Lustgarten, an infant, by his Guardian, *ad Litem*, John A. Lydecker,

Federal Sugar Company, Ltd., *et al.*, Petitioners,

56 vs.

The United States of America.

Royal Insurance Company, Ltd., *et al*, Petitioners,

123 vs.

United States Shipping Board Merchant Fleet Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR A REHEARING

OF

John Johnson, Petitioner, and Benjamin Lustgarten, Respondent, and

Silas B. Axtell, as *amicus curiæ* on behalf of Henry Schaeffer and Michael D'Arcy;

Raymond F. Parmer, as *amicus curiæ* on behalf of Michael Shea;

Paul Matthews, as *amicus curiæ* on behalf of Walter J. Masjulis;

JOHN WINANS, as *amicus curiæ* on behalf of Barry R. Lundy;
FREDERICK R. GRAVES, as *amicus curiæ* on behalf of Manuel L. Ochoa;
SAMUEL N. BROOK, as *amicus curiæ* on behalf of Alfred Adders;
EDGAR J. TRACY, as *amicus curiæ* on behalf of Jesse Christman and Rosa Blum.

Come now the above named petitioners and present this their petition for a rehearing of the above entitled causes, and in support thereof respectfully show:

Concerning the Importance of the Decision in these Causes.

Your petitioners, Johnson and Lustgarten, and those on whose behalf the petition is presented by counsel appearing as *amici curiæ*, all received injuries in connection with the operation of ships under the control and management of the Fleet Corporation, with the exception of those claiming under a decedent who suffered injuries resulting in death. Many of the injuries suffered were serious and a permanent character and one resulted in death. The nature of each such injuries is specified in the schedule annexed marked "A". That such injuries were caused through negligence attributable to the Fleet Corporation has been adjudged. In each case a judgment has been recovered in an action brought against the Fleet Corporation, the date and amount of which is also set forth in Schedule A. More than two years have elapsed since the respective injuries were suffered, and no libel in admiralty has been filed on their behalf to recover for such injuries. If the judgments recovered are reversed because redress was sought in actions at law, those injured are without remedy.

In 1922 before these suits were brought, it had been determined that the Suits in Admiralty Act did not provide an exclusive remedy, and it appears that for a long time subsequently, the government did not seriously contend that that statute barred suits at law by injured seamen.

In *Wright* vs. *the Fleet Corporation,* 285 Fed. 647, (1922), the argument was advanced as to the exclusiveness of the Suits in Admiralty Act, but the defense based thereon was dismissed by Hon. Augustus N. Hand, now Circuit Judge.

In 1925, the case of *Fleet Corporation* vs. *O'Shea,* 5 F. (2d) 123, was affirmed in the United States Circuit Court of Appeals, District of Columbia. There a boatswain had been injured through the negligence of the mate in compelling him improvidently to work in a dangerous place. No petition for a writ of certiorari was presented by the government's attorneys, although the cause of action was handled in its Washington office.

Two years later, the Circuit Court of Appeals in the Second Circuit in the case of *Greenwald* vs. *Fleet Corporation,* 16 F. (2d) 948 (1927), held that a cause of action for death arising through the furnishing of improper food, and neglect on the part of the master to give proper treatment afterwards to a sick seaman, presented a cause of action under the Jones Act, and the judgment in full, in the substantial sum of $10,000. was paid by the Fleet Corporation, without any effort to have the matter reviewed by this Court.

It thus appears that from 1922 until 1928, the date of the decision in *Fleet Corporation* vs. *Rosenberg,* 276 U. S. 202, there was not the slightest intimation on the part of any court, nor was it seriously urged by the Fleet Corporation, that the exclusive remedy of seamen for injuries suffered, was to proceed under the terms of the Suits in Admiralty Act.

Not only are those in whose behalf this petition is presented affected by the determination of the court in the above entitled causes, but many other claimants who, relying upon the earlier decisions, brought suits at law against the Fleet Corporation. Annexed is a schedule marked "B" of such of the suits so brought, which have come to the attention of your petitioners.

That such facts may appropriately be considered by the court on such an application is indicated by the case of *Green* vs. *Biddle*, 8 Wheat. 1, 17 (1823), where it appears that Mr. Henry Clay, as *amicus curiæ*, moved for a rehearing in the cause upon the ground that it involved the rights and claims of numerous occupants of land in Kentucky, stating that the rights and interests of those claimants would be irrevocably determined by the decision of the court. The motion so made was granted.

We respectfully submit that unless there is some compelling reason, this court should not now, nearly ten years after the passage of the Suits in Admiralty Act and the Jones Act, place a construction thereon completely at variance with the construction which was adopted by the lower courts at an early date after the passage of these acts, and which has been relied upon by countless suitors who will now be rendered remediless if the former construction is overruled.

Schedule A.

This is a list of those seamen who claim a right of action against the Fleet Corporation and/or operator at common law with right of trial by jury and whose claims have been reduced to judgments and who have not filed libels. More than two years have expired since the accrual of their causes of action. The schedule contains in the order indicated the following items of information: Name of plaintiff and defendant; attorney and address; the court where judgment obtained; amount of judgment; date of judgment; character of the negligence; nature of the injury.

.....

Henry Schaeffer *v.* Fleet Corporation; Mr. Silas B. Axtell of 11 Moore Street, New York, N. Y.; Supreme Court for County of Kings; $8,185.60; 12/3/28; failure to provide plaintiff with proper equipment to hoist pontoon from water; fracture of vertebrae, permanent injury.

Michael D'Arcy *v.* Fleet Corporation; Mr. Silas B. Axtell; Supreme Court for County of New York; $15,177.25; 1/5/29; failure to provide proper gangplank; fracture of vertebrae, permanent injury.

Benjamin Lustgarten *v.* Fleet Corporation; Mr. Silas B. Axtell; District Court for Southern District of New York; $10,226.50; 7/22/27; failure to treat, brutal treatment; incipient tuberculosis.

Manuel Ochoa *v.* Fleet Corporation and Black Diamond SS. Corp.; Mr. Frederick R. Graves of 11 Broadway, New York, N. Y.; Supreme Court for County of Richmond; $9,359.55; 6/13/29; unguarded opening between decks; fractured spine.

Walter J. Masjulis *v.* Fleet Corporation and Consolidated Nav. Co.; Mr. Paul Matthews of 29 Broadway, New York, N. Y.; District Court for Southern District of New York; $30,117.40; 12/13/29; caused to drop to deck, defective boatswain's chair; fractured skull and internal injuries.

Michael Shea *v.* Fleet Corporation and Export SS. Corporation; Mr. Raymond F. Parmer of 27 William Street,

New York, N. Y.; Supreme Court for County of Richmond; $3,399.90; 4/21/28; failure to treat; chronic anœbic dysentery.

Barry R. Lundy *v.* Fleet Corporation and United Gulf SS Company; Mr. John Winans of 50 Church Street, New York, N. Y.; District Court for Eastern District of New York; $17,641.50; 12/16/29; negligent swinging of gangplank on deck; total loss of hearing in one ear, partial loss of hearing in the other.

Alfred Adders *v.* Fleet Corporation and Moore & McCormack Co.; Mr. Samuel N. Brook of 261 Broadway, New York, N. Y.; District Court for Southern District of New York; $6,557.85; 2/28/29.

Jesse Christman as adm. of Estate of Ed. Weldon; Christman *v.* Fleet Corporation and Tampa Interocean SS. Co.; Mr. Edgar J. Tracy of 15 Park Row, New York, N. Y.; Supreme Court for County of Kings; $3,696.50; 12/13/28; Washed overboard through improvident order; death.

Rosa Blum *v.* Fleet Corporation and United American Lines, Inc.; Mr. Edgar J. Tracy; District Court for Eastern District of New York; Verdict of $5,000; Feb./29; greasy deck; broken leg.

Schedule B.

This is a list of seamen who claim to have a right of action at law against the Fleet Corporation and/or operator with right of trial by jury. This list contains in the order indicated: Names of the plaintiff and defendant; court where suit filed; amount sued for; date of injury.

.....

Alexander Lovette, Jr., as adm. of Estate of Benjamin Lovette, Jr., deceased, *v.* Fleet Corporation & Lykes Brothers; United States District Court for Southern District of N. Y.; $50,000; July 8, 1927.

Claude Stratton *v.* Fleet Corporation and Shipping Board; Supreme Court for County of New York; $30,000; June 29, 1925.

Joseph P. Duffy *v.* Fleet Corporation; Supreme Court for County of New York; $25,000; November 28, 1924.

Marion Steele *v.* Fleet Corporation & Lykes Brothers; City Court of the City of New York; County of New York; $3,000.; October, 1925.

Eugene McCarthy *v.* Fleet Corporation; Supreme Court for County of Kings; $25,000.; September 30, 1924.

Adolph Sandberg *v.* Fleet Corporation; Supreme Court for County of Queens; $10,000.; March 10, 1925.

Joseph Cater *v.* Fleet Corporation and Consolidated Navigation Company, Inc.; Supreme Court for County of Kings; $30,000.; November 30, 1925.

Edward Goellner *v.* Fleet Corporation and Consolidated Navigation Company, Inc.; City Court of City of New York; County of New York; removed to U. S. District Court; Southern District of New York; $10,000.; October 2, 1925.

Harry Sullivan *v.* Fleet Corporation and Lykes Brothers; City Court of City of New York; $3,000.; July 29, 1926.

Carl Johnson *v.* Fleet Corporation and Consolidated Navigation Company; Supreme Court for County of Kings; $30,000.; July 10, 1925.

John Morris *v.* Fleet Corporation and Kerr SS. Company; Supreme Court for County of Richmond; $10,000.; January 29, 1924.

Hollis Randall *v.* Fleet Corporation and Consolidated Navigation Company; Supreme Court for County of Richmond; $15,000.; December 15, 1924.

Milton Ruble as adm. of Estate of Charles Ruble, deceased, *v.* Fleet Corporation; District Court for Southern District of New York; $50,000.; February 15, 1927.

Bernard Barton *v.* Fleet Corporation and International Freighting Corporation; City Court of City of New York; County of New York; $2,000.; June 15, 1925.

August Jensen *v.* Fleet Corporation and Consolidated Navigation Company; City Court of City of New York; County of New York; $3,000.; July 1, 1925.

Sophie Meier *v.* Fleet Corporation; Municipal Court; Third District; $1,000.; September 26, 1927.

Guerry Pharr *v.* Fleet Corporation and American Republic Line and C. H. Sprague & Son, Inc.; District Court for Southern District of New York; $25,000.; May 18, 1927.

James Jackson *v.* Fleet Corporation and American Republic Line and C. H. Sprague & Son, Inc., City Court of City of New York; County of New York; $10,000.; July 3, 1927.

Eugene Riley *v.* Fleet Corporation and A. H. Bull & Company; City Court of New York, County of New York; $3,000.; April 23, 1927.

Leonard Mallet *v.* Fleet Corporation and Waterman SS. Company; Supreme Court for County of Richmond; $30,000.; January 28, 1927.

Adolphe Rundblom *v.* Fleet Corporation and Mississippi Shipping Company; City Court of City of New York; County of New York; $2,500.; December 20, 1926.

John Saxon *v.* Fleet Corporation; City Court of City of New York; County of New York; $3,000.; March 2, 1927.

Thomas McIntyre *v.* Fleet Corporation; City Court of City of New York; County of New York; $3,000.; January 7, 1927.

Elmer W. Lindsay *v.* Fleet Corporation and Waterman SS. Company; City Court of City of New York; County of New York; $10,000.; July 13, 1926.

Michael Bergsin *v.* Fleet Corporation and W. A. Blake & Company; Supreme Court for County of Richmond; $35,000.; June 20, 1924.

Lawrence Ashcroft *v.* Fleet Corporation and International Freighting Corporation; City Court of City of New York; County of New York; $3,000; April 30, 1925.

Wilbur H. Meyer *v.* Fleet Corporation and Lykes Brothers; District Court for Southern District of New York; $45,000.; October 15, 1925.

William Faise *v.* Fleet Corporation and S. I. Ship Building, Inc.; City Court of City of New York; County of New York; $3,000.; February 1927.

Edward Brady *v.* Fleet Corporation and International Freighting Corporation; District Court for Southern District of New York; $30,000.; March 22, 1927.

Edward Russel *v.* Texas Transport & Terminal Company; District Court for Southern District of New York; $50,000.; November 29, 1926.

K. F. Altio as adm. of Estate of Ardio Kusisto *v.* Fleet Corporation; District Court for Southern District of New York; $35,000.; April 13, 1927.

Richard Harvey *v.* Admiral Oriental Line; Superior Court State of Washington, Kings County, No. 21807; $35,000; January 1927.

Ernest E. Smith *v.* Shipping Board Fleet Corporation; Supreme Court of Pennsylvania No. 14168, 1928 September Sessions; $50,000.; February 1927.

Isaac T. Gray *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $20,000.; December 23, 1926.

Joseph Paul *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $40,000.; February 4, 1926.

Edwin R. Roberts *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $10,000.; December 29, 1925.

John T. Taylor *v.* Fleet Corporation and operator; United States District Court for the Eastern District of Louisiana; $10,063.; July 24, 1927.

Gilbert H. Hunter *v.* Fleet Corporation and operator; Supreme Court of Kings County; $50,000.; December 16, 1925.

Robinette D. Johnson as administratrix of the Estate of William Johnson, deceased, *v.* Fleet Corporation and C. H. Sprague; United States District Court for Southern District of New York; $65,000.; May 2, 1927.

Arnold Hansen *v.* Fleet Corporation and A. H. Bull; United States District Court for Southern District of New York; $115,000.; March 1, 1927.

John Palanis *v.* Fleet Corporation; Supreme Court for County of New York; $50,000.; December 23, 1925.

John Kitson *v.* Fleet Corporation and J. H. Winchester & Co.; Supreme Court for County of Kings;

John Beaudia *v.* Fleet Corporation and J. H. Winchester & Co.; Supreme Court for County of Richmond; $5,000.; January 15, 1926.

Gustav Bjorklund *v.* Fleet Corporation and Kerr Steamship Line; Supreme Court for County of Kings; $50,000.; March 30, 1926.

Robert L. Parker *v.* Fleet Corporation and Tampa Interocean SS. Co.; Supreme Court for County of Kings; $25,000.; June 27, 1927.

Albert Rozmus *v.* Fleet Corporation and Atlantic Gulf & Oriental Steamship Company; Supreme Court for County of Kings; $2i,000.; December 17, 1925.

Buena Ventura Beroin *v.* Fleet Corporation and A. H. Bull SS. Company; Supreme Court for County of Kings; $10,000.; July 27, 1927.

John Servas *v.* Fleet Corporation and Mississippi Shipping Company; Supreme Court for County of Kings; $30,000.; August 8, 1927.

Herbert Hartman *v.* Fleet Corporation & J. H. Winchester & Co.; Supreme Court County of Kings; $5,000.; December 4, 1925.

Concerning the Points Which the Court Has Overlooked or Misapprehended.

Congress did not intend that the remedy granted by the Suits in Admiralty Act should be exclusive of actions at law by seamen against the Fleet Corporation.

We respectfully call to the court's attention the fact that the decision rendered herein has been arrived at through the application of rules of construction and by superimposing one judicial construction upon another. Certain intentions have been imputed to Congress based upon such rules of construction, which we submit are at variance with its actual intent. We submit that the court has permitted logic and reason to obscure the facts concerning the actual intention of Congress in passing the Suits in Admiralty Act and the Jones Act.

Through the application of rules of construction and logic, in *Fleet Corporation* v. *Rosenberg* (1928), 276 U. S. 202, the court imputed to Congress an intent to make the remedy afforded in the Suits in Admiralty Act exclusive of all other remedies in admiralty. In that case, however, the court was not required to, and did not, pass upon the question as to whether suits at law might still be maintained against the Fleet Corporation. In the instant case the court has built upon the intention so imputed to Congress, in the *Rosenberg* case, and has now imputed to Congress not only a further intention concerning the Suits in Admiralty Act, which is not clearly expressed therein, but also an intent concerning the Jones Act, which is contrary to the express provisions thereof.

Furthermore, the intent attributed to Congress in the passage of the Jones Act is based merely upon a presumption that the intent of Congress, when it passed the Suits in Admiralty Act on March 9, 1920, was projected three months into the future and persisted at the time of the passage of the Jones Act on June 5, 1920.

We submit that the history of the facts surrounding the passage of both of these Acts, is a more reliable basis upon which to determine the intent of Congress, than the application of rules of construction no matter how logical, and would further suggest that rules of construction should be resorted to only when it is impossible from an examination of the surrounding facts to determine the actual intent.

In Section 33 of the Jones Act (U. S. Code, Title 46, Section 688), which as above stated was passed three months after the Suits in Admiralty Act, Congress provided as follows:

> "*Recovery for Injury to or Death of Seaman.* Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.)"

We shall later discuss the intent of Congress in passing the Suits in Admiralty Act. Without regard, however, to what may have been the intent of Congress in March, 1920, when it passed that Act, its clearly expressed intent on June 5, 1920, in passing the Jones Act, should not be circumscribed or defeated merely by a presumption that a former intention persisted.

Section 33 of the Jones Act, above quoted, by its express terms applies to "any seaman who shall suffer personal

injury in the course of his employment". No exception is made of seamen employed on ships operated or managed by the Fleet Corporation.

We have examined the debates in Congress upon the bill which became the Jones Act and find no word to indicate that it was thought by anyone that this Act should not relate to all seamen employed in American shipping. Had there been any intent that it should not apply to seamen employed on vessels of the government merchant fleet, such intent must surely have found expression in the act.

The following excerpt from the Eighth Annual Report of the Secretary of Commerce under date of October 30, 1920 sets forth the shipping under the control of the Fleet Corporation and that which was privately owned. In that report it was stated (page 171):

> "The recent growth of the Government's ownership of these ships of 1,000 gross tons is shown by the following statement of the number and tonnage of such ships registered or enrolled in the name of the United States, represented by the Shipping Board and of those of commercial companies and individuals on January 1, 1919 (soon after the armistice of November 1918), on July 1, 1919, the beginning, and July 1, 1920, the close of the fiscal year just ended, and on October 1, 1920:

	Shipping Board		Private Shipowners		Total	
	Number	Gross tons	Number	Gross tons	Number	Gross tons
Jan. 1, 1919..	608	2,305,015	1,055	3,351,841	1,663	5,656,856
July 1, 1919..	982	3,827,203	1,076	3,472,819	2,058	7,300,022
July 1, 1920..	1,630	6,903,128	1,209	3,942,974	2,839	10,846,102
Oct. 1, 1920..	1,698	7,288,208	1,266	4,194,709	2,964	11,482,917"

It thus appears, that, on July 1, 1919, ships of the United States Merchant Fleet, exclusive of those of less than 1,000 gross tons, were of the aggregate gross tonnage of 3,827,203, as compared with similar ships of United States registry privately owner of 3,472,819 gross tons, and that by July 1, 1920 the aggregate gross tonnage of the government merchant fleet had risen to 6,903,128, as compared with those privately owned of 3,942,974 gross tons.

We submit that the argument of the Government that Congress intended Section 33 of the Jones Act to apply to only forty per cent. of American Shipping, is without foundation in fact.

Nor can it be contended that Congress was not aware of the fact that sixty per cent. of all American shipping was under the control of the Fleet Corporation when it passed the Jones Act. The expense of these ships had run to more than $3,800,000,000. (see annual reports of the Secretary of the Treasury, 1920-1929). The operation and disposition of this vast amount of government owned shipping was one of the pressing problems with which Congress was confronted and which it was endeavoring to solve at the time the Jones Act was passed. That Act was largely concerned with provisions restating the character and duties of the Fleet Corporation, (see particularly Sections 1, 5, 7, 12, 14) and Section 18 of that Act specifically provided with respect of the vessels under the control of the Fleet Corporation,

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

The intent of Congress in enacting Section 33 of the Jones Act is clear. Its purpose was to better protect seamen. Congress thereby granted to them a right which they did not formerly possess, *i. e.,* the right to recover damages for injuries resulting in death. It also abolished with respect of seamen the fellow-servant rule which, in these modern times, has repeatedly been declared to be unjust and antiquated, and gave further assurance to seamen of the right to a trial by jury in actions to recover damages for injuries suffered.

In the absence of a clear expression of an intent to exclude seamen engaged in sixty per cent. of American shipping from the benefits of this Act, such an intention cannot

be imputed, without also imputing a failure on the part of Congress to accomplish its purpose. To impute such an intention is not to construe but to destroy.

Nor can we ignore the position of the Government after this act was passed. As heretofore stated, the Fleet Corporation paid judgments recovered against it in actions at law for injuries suffered by seamen, without attempting to have those judgments reviewed by this Court upon this ground. Is it possible to believe that the Fleet Corporation was oblivious of such an intent of Congress if there was any such intention? The failure of the Government to actively urge a defense based upon this ground, for several years after the Jones Act was passed, is significant of the fact that counsel were aware that Congress had no such intent. The reason the defense is now urged is because of the remarks of this court in the *Rosenberg* case.

The position of the Government concerning the effect of the Jones Act was clearly stated in *United States* v. *C. A. Lindgren, Admr.*, No. 25, October Term, 1929, argued on October 8, 1929. There, the Fleet Corporation argued in this court, as its main defense, that Section 33 of the Jones Act did apply to seamen employed on Fleet Corporation ships, and afforded an exclusive right to recover damages for the wrongful death of a seamen occurring on such a ship. The Circuit Court of Appeals accepted the argument of the Fleet Corporation and reversed the judgment of the lower court; *United States* v. *C. A. Lindgren as Admr.*, 28 F. (2d) 725 (1928). The Fleet Corporation argument in that case cannot be reconciled with its position in the instant causes that that section does not apply to seamen employed on ships of the merchant fleet.

We turn now to a brief history of the Suits in Admiralty Act. That Act provided in Section 2 (U. S. Code, Title 46, Section 742):

> "*Libel in Personam.* In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, *a libel in*

> *personam may be brought* against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation."

There was no exclusive language in that Act other than in Section 1, which provided that,

> "No vessel * * * shall, in view of the provisions herein made for libel *in personam*, be subject to arrest or seizure."

None of the authoritative reports of the Congressional Committees, in charge of the Suits in Admiralty Act legislation, give any suggestion of the purpose to exclude seamen from their actions at law against the Fleet Corporation. The sole purpose expressed by these committees was to save the Government needless expense which was daily occurring in bonding ships which had been seized by process *in rem*.

Thus the Committee on Commerce of the Senate stated in its report, (No. 223, 66th Congress, 1st Session) submitted September 12, 1919:

> "The result of this is to subject the United States to unnecessary expense and its vessels to great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels. The principal object of suits *in rem* is to insure the collection of the claim by subjecting the vessel to it. It is not necessary in the case of the United States, which is absolutely responsible, and under the bill ample provision is made for prompt payment of any claim found to be due."

Senator Jones, who was Chairman of the Committee on Commerce, explained this situation further upon the floor of the Senate (Congressional Record, Vol. 58, Part VII, 66th Congress, First Session, p. 7138):

> "I want to say that the Attorney General's office called me up day before yesterday, I think, and stated that there was a ship down in New Orleans that had

been libeled and the court there refused to allow it to go. They have no way in which they can furnish bond unless they go out and arrange it in a roundabout way, as an accommodation for the Government on the part of somebody to furnish a bond so that this ship may go into commerce. That condition of things ought not to exist, of course, and we are trying to avoid it in the future."

Senator Jones was here not giving his own private views upon the purpose of this Act, but was speaking for the Committee, urging the Senate as a whole, to act upon the bill.

We submit that these statements from the reports of Congressional Committees present a more accurate basis for determining the actual intent of Congress, in the passage of these sections of the Suits in Admiralty Act, than the application of rules of construction and logic.

The history of the judicial construction of this Act is also enlightening. In *Wright* v. *Fleet Corporation,* 285 Fed. 647 (1922), the contention that the Act provided an exclusive remedy was overruled. In *Blamberg* v. *United States,* 260 U. S. 452 (1923), and in *Shewan & Son* v. *United States,* 266 U. S. 108 (1924), this court declared that the main purpose of the Act was the substitution of an admiralty remedy *in personam* against the United States for a previously existing admiralty proceeding *in rem* against merchant vessels of the United States.

In *Wallace* v. *Fleet Corporation,* 5 F. (2d) 234, 236 (1925), Judge Neterrer of the Federal District Court for the Western District of Washington, who has written many admiralty opinions, overruled a defense that the Suits of Admiralty Act was exclusive of the remedy afforded by the Tucker Act.

In *Fleet Corporation* v. *Texas Star Flour Mills,* 12 F. (2d) 9, 12 (1926), an action at law, the Circuit Court of Appeals for the Fifth Circuit held that the provision as to interest under Section 3 of the Suits in Admiralty Act was not exclusive, but only applied to cases brought in admiralty under that act. (Citing *Wright* v. *Fleet Corporation, supra.*)

Eastern Transportation Co. v. *United States,* 272 U. S. 675 (1926), held that while the main purpose of the act was to exempt from seizure and arrest merchant vessels of the United States, it "also had a wider effect and created a broader obligation of the United States, as the owner of an offending vessel, like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem.*" (*Fleet Corporation* v. *Rosenberg,* 276 U. S. 202, 212).

It was not until February, 1928, when this court decided the case of *Fleet Corporation* v. *Rosenberg* (*supra*), that it was held that the Suits in Admiralty Act to any extent provided an exclusive remedy. The court then held "that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporation on all maritime causes of action arising out of the possession or operation of merchant vessels", but was careful to state:

> "Whether in addition to furnish an exclusive remedy in admiralty, the Act also prevents a resort to any concurrent remedies against the United States or corporations on like causes of actions in the court of claims or the courts of law, is a question not presented by these cases and upon which, although referred to in the argument, we express no opinion."

We submit that the court should not further extend the doctrine of that case by imputing to Congress an intention by the Suits in Admiralty Act to exclude suits at law against the Fleet Corporation.

An examination of the decision of the court in that case discloses that it was based upon four grounds, *i. e.,* (1) a complete system of administration; (2) uniformity; (3) payment of judgments from the United States Treasury; and (4) repealer clause in Section 13 of the Suits in Admiralty Act. We submit that none of the grounds there stated lead to the conclusion that Congress intended to prohibit actions at law against the Fleet Corporation.

As to the first ground: It is obvious that there is a complete

system of administration with respect of suits in admiralty, but in other respects it is not complete; that is to say, it is not complete as to all claims affecting the Fleet Corporation. In no part of the act does it refer to land torts, nor to actions for breaches of other than maritime contracts. Actions may still be maintained at law against the Fleet Corporation, for such land torts and breaches of such contracts. The test was, "where a proceeding in admiralty may be brought," not, whether in addition, an action at common law for a maritime cause of action may be brought. No attempt having been made by Congress to provide a remedy for such claims against the Fleet Corporation, there is no reason to suppose that it intended by providing the system of administration with respect of proceedings of suits in admiralty, to exclude actions at law by seamen.

As to the second ground: The use of the word "uniformity" on page 213 of the *Rosenberg* opinion, was not made in the usual sense of that term in maritime law. This term as ordinarily used means that the maritime law in its substantive features shall not have divergent rules. This has been many times established. See *Chelentis* v. *Luckenbach,* 247 U. S. 372 (1917); *Panama Railroad* v. *Johnson,* 264 U. S. 375, 388 (1923).

To secure uniformity in the maritime law, it is not necessary to exclude the common law actions of these seamen. The final pronouncement of any question of substantive maritime law which would arise, no matter in what tribunal the action should be brought, would be made by this court and this court would therefore not be troubled by the spectre of lack of uniformity. This defense was made by the Fleet Corporation as long ago as 1921 in the case of *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549, at page 568, and was peremptorily dismissed by Mr. Justice Holmes, who stated:

> "It is suggested that there will be lack of uniformity if suits can be brought in State Courts. This consideration cannot control our conclusion from the statutes. But is is not very serious since such suits against this

> Corporation can be removed to the Courts of the United States, *Pacific Railroad Removal Cases,* 115 U. S. 1, and afterwards are subject to review here. *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246, 258. *Southern Pacific Co.* v. *Stewart,* 246 U. S. 359; *ibid.* 562."

As to the third ground: This presents the question as to whether the payment of judgments out of money in the Treasury demands the exclusive construction. This argument proceeds on the ground that the United States is the real party in interest, an argument which is bolstered by the citation in the *Johnson* case of the case of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 385 (1901). In other words, that the suit although not against the United States, is against the property of the United States.

The answer to this defense is that that is simply not the fact in these cases. These defendants sue only the Fleet Corporation and ask only for a judgment *in personam* against it.

In *Minnesota* v. *Hitchcock,* (*supra*) the proceeding was directed against the property of the United States. It was a suit in equity to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any land in an Indian Reservation.

This court long ago pointed out there is a wide distinction between the Fleet Corporation and the United States. As Mr. Justice Holmes stated in *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 567 (1922):

> "The plaintiffs are not suing the United States but the Fleet Corporation."

The fact that all judgments recovered in admiralty suits were to be reported to Congress is explained by the provisions of the act providing for the payment of the judgments so recovered out of the Treasury of the United States without further act of Congress. Congress simply wished to require that it be advised of such payments which otherwise would not necessarily be brought to its attention. No provision was made for the payment of other judgments. These must, therefore, be brought to the attention of Congress so that appropriations may be made for their payment.

As to the fourth ground: While section 13 of the Suits in Admiralty Act repealed "the provisions of all other acts" inconsistent with the act in question that presents no obstacle to the maintenance of these suits, which are not based upon any prior acts which may have been repealed, but upon a right recognized at common law. It is true that we are also relying on the provisions of the Jones Act, but as this was passed subsequently to the Suits in Admiralty Act, no repealer clause in that act can affect it.

Whatever may be thought concerning the effect of the *Rosenberg* case, it is clear that there the court only construed the Suits in Admiralty Act. The provisions of the Jones Act were not there discussed and were not even called to the attention of the court. The question with which the court is now primarily concerned is not the construction of the Suits in Admiralty Act, but the construction of the Jones Act passed three months later.

In considering the appropriate construction of the Suits in Admiralty Act, attention is directed to the remarks of Mr. Justice Van Devanter considering Section 33 of the Jones Act, the language of which is permissive, as is also that of Section 2 of the Suits in Admiralty Act. In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390 (1923) he stated:

> "It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissable. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted, but not required, to proceed on the common-law side of the court with a trial by jury as an incident."

While we urge the view that in providing a remedy *in personam* in actions in the Suits in Admiralty Act, Congress did not thereby intend to exclude or forbid actions at law by seamen to recover damages suffered by them, nevertheless the determination of the instant causes must in final analysis turn upon the construction of the Jones Act. To construe the Suits in Admiralty Act as excluding these actions at law, the court must read into that act words which are not there found, and such construction can only be justified by imputing an intention to Congress which is in no way supported by the reports of the committees thereof relating to this act, or justified by the circumstances at the time that act was passed and which called forth the portions of that act here in question. We submit that in no event should such an imputed intention be deemed to be perpetuated three months beyond the date of the passage of that act for the purpose of defeating the clearly expressed purpose of Congress in extending benefits to seamen provided for in Section 33 of the Jones Act.

This court has recognized that seamen are wards of the courts. Are they any less so because they are employed on vessels operated by the Fleet Corporation? If so, how may this court justify a construction of Section 33 of the Jones Act which would deprive seamen who were employed on sixty per cent of American shipping from the benefits conferred on all seamen by that statute?

Concerning the Constitutionality of the Suits in Admiralty Act if it be Construed as Excluding the Right of Seamen to Maintain an Action at Law Against the Fleet Corporation.

We submit that such a construction of the Suits in Admiralty Act would render it unconstitutional on the following grounds: The claims sued upon by Johnson and Lustgarten were cognizable at common law. Their rights are not dependent upon statute. While in our view common law actions by seamen were specifically authorized by the Jones Act, if that Act be construed as inapplicable to them because of their employment on vessels operated by the Fleet Corporation, they could still pursue the rights accruing to them under the common law. To what conclusions does this lead?

First, that any statute attempting to place the Fleet Corporation, while engaged in a business for profit in a special class, and to exempt it from suits to which other corporations would be liable, would be discriminatory and violative of the *Fifth Amendment.* It would, in effect, give the right to the Fleet Corporation to deprive citizens of their property without due process of law.

It is unnecessary to consider how far Congress may grant immunities to a corporation created by it to carry on purely governmental functions; that question is not here involved, as there is here clearly presented the situation of a corporation dealing in a proprietary capacity and operating for a profit. The distinctions between the acts of public or quasi public corporations, in carrying on proprietary as distinguished from governmental functions, has long been recognized and cannot be disregarded without creating a precedent having far-reaching and probably ominous results.

That the Fleet Corporation was engaged in a business of a private or proprietary character was definitely established by this court in *Sloan Shipyards* v. *Fleet Corporation,*

258 U. S. 529 (1922), and Congress has no power to confer governmental immunity on such a corporation operating and recognized by Congress to be operating a proprietary business for pecuniary profit.

Second, if this statute be construed as depriving seamen of the right to maintain an action at law for injuries suffered, it is also violative of the *Seventh Amendment* guaranteeing the right to trial by jury.

The right to maintain an action at law and to a jury trial thereof was guaranteed by the *Seventh Amendment* of the Constitution. The common law remedy of enforcing a claim for injuries such as those in question, was in existence before the passage of the Judiciary Act (*Story's Commentaries on the Constitution,* 4th Ed. Sec. 1672, Note 4; *The Hamilton,* 207 U. S. 398, 404 [1907]) and the Seventh Amendment was proposed for adoption by Congress at the same time that the Judiciary Act was passed.

In saving the common law remedy in 1789, Congress saved it because it could not and deemed it could not have taken it away. The first Congress in the Judiciary Act of 1789, in dealing with all cases of admiralty jurisdiction, saved to suitors in all cases the right of a common law remedy where the common law was competent to give it. (1 Stat. 76, 77; *United States Code,* Title 28, Sections 41 and 371). It is true that prior to the adoption of the amendment claimants also had the right to sue in admiralty for the damages suffered from maritime torts but the right to sue at law and secure a jury trial thereof was a concurrent right.

By proceeding at common law, these plaintiffs had as part of the remedy the right of trial by jury (*Chelentis* v. *Luckenbach Steamship Co.,* 247 U. S. 372 [1917]; *Philadelphia R. R. Co.* v. *Berg,* 274 Fed. 574 [C. C. A., 3, 1921]; *Bonham* v. *Southern Menhaden Corp.,* 284 Fed. 362 [D. C., S. D. Fla., 1922]).

Congress has no right to declare that a citizen shall be deprived of a common law action and the right of trial by jury which he has concurrently with a remedy *in personam* in admiralty against the Fleet Corporation, by declaring that he must proceed, if at all, only in admiralty and without right

of trial by jury. So construed, Congress would be taking away a right of trial by jury in a field of remedial law over which capacity to so legislate was reserved from it by the *Seventh Amendment,* and the constitutionality of the Suits in Admiralty Act would be placed in grave doubt.

Congress, it is conceded, could take away a remedy in the nature of a right of trial by jury, if Congress had created it. Congress could also create an exclusive remedy in connection with new substantive rights in the admiralty Courts because of the grant of jurisdiction in *Section 2, Article III of the Constitution, Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 386 (1923), but here the right involved has been reserved from the province of Congress by the *Seventh Amendment.*

Congress "saved" the common law remedy in actions for maritime torts, but this was merely "abundant caution" on the part of Congress (Chief Justice Nelson on page 390, *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344 [1848]).

The court should never construe an act of Congress in such a manner as to even create a doubt as to its constitutionality, if another construction is available (*Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 390 [1923]).

Even if the Suits in Admiralty Act should now be construed as providing for an exclusive remedy and it be held that the Jones Act does not apply to seamen employed in connection with ships operated by the Fleet Corporation, the jurisdiction assumed by the courts when these suits were brought should not now be disturbed.

We have heretofore set forth the fact that within a short time after the passage of this Act, the remedy therein provided for was held not to be exclusive and such determination was not overruled or excepted to, until the determination of the *Rosenberg* case by this court in 1928. Under the law as it then stood, numerous suits were instituted and the lower courts took jurisdiction thereof. This being so, the court should direct them when necessary to continue such jurisdiction.

In *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 593 (1921), the court stated as follows:

> "It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *United States* v. *Babcock*, 250 U. S. 328, 331. But the law has become thus settled since this suit was commenced in 1911, and the lower courts, upon the allegations in the bill, properly assumed jurisdiction and disposed of the case. *Busch* v. *Jones*, 184 U. S. 598, 599; *Clark* v. *Wooster*, 119 U. S. 322, 326."

Following the determination of the court in that case, without regard to its opinion concerning the construction of the acts in question, the court should recognize the propriety of the lower and state courts which accepted jurisdiction of claims of the character mentioned prior to the determination of this case.

The direction in the court's opinion herein, as to the disposition of the *Johnson* case does not follow the conclusion of the court set forth in its opinion. Johnson appealed to this court and judgment was granted in favor of the Fleet Corporation for $25. and costs (R. 7). The court directed, however, that the judgment in the *Johnson* case, being Case No. 5, should be reversed.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that upon further consideration, the judgment in the *Lustgarten* case be affirmed and that a new trial be ordered in the *Johnson* case.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioners Johnson and Lustgarten, as *amicus curiæ*, and as counsel for the other petitioners as *amici curiæ*,

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(Italics in this brief are our own.)

I, SILAS B. AXTELL, counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing for these causes is presented in good faith and not for delay.

Silas B. Axtell

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Counsel for Petitioners.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928 29

No. ~~676~~ 32

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

vs.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1929
CERTIORARI GRANTED MARCH 5, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 676

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

vs.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Southern District of New York

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, John A. Lydecker, plaintiff

AGAINST

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION and Consolidated Navigation Company, Inc., defendants

Writ of Error

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable judges of the United States District Court for the Southern District of New York, Greetings:

Because in the proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for the Southern District of New York before you, or some of you, between Benjamin Lustgarten, an infant, by his guardian ad litem, John A. Lydecker, plaintiff, and the United States Shipping Board Emergency Fleet Corporation and Consolidated Navigation Company, Inc., defendants, a manifest error hath happened to the great damage of the said United States Shipping Board Emergency Fleet Corporation and the Consolidated Navigation Company, Inc., as by their answers appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties afore-
2 said in its behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Court of Appeals for the Second Circuit, together with this writ, so that you may have the same in the said United States Circuit Court of Appeals for the Second Circuit at New York, within thirty (30) days from the date hereof, with the records and proceedings aforesaid being inspected the said United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States shall be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of October, in the year of our Lord, one thousand nine hundred and twenty-seven.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the United States District Court for the Southern District of New York.

Allowed October 5th, 1927.

T. D. THACHER,
Judge of the United States District Court for the Southern District of New York.

3 [Summons in usual form omitted in printing.]

4 In United States District Court

Complaint

[Title omitted.]

Plaintiff, complaining of the defendants, respectfully alleges:

First. Upon information and belief that the defendant, United States Shipping Board Emergency Fleet Corporation, is a foreign corporation, organized and existing under and by virtue of the laws of the District of Columbia, having an office and place of business in the borough of Manhattan, city and State of New York.

Second. Upon information and belief that the defendant, Consolidated Navigation Co., Inc., is a domestic corporation, having an office and place of business in the borough of Manhattan, city and State of New York.

Third. Upon information and belief that the defendant, United States Shipping Board Emergency Fleet Corporation, at and during all the times hereinafter mentioned owned, managed and controlled a certain vessel known as the "Coelleda."

5 Fourth. Upon information and belief, that the defendant, Consolidated Navigation Co., Inc., at and during all the times hereinafter mentioned, operated, managed, and controlled a certain vessel known as the "Coelleda."

Fifth. That the plaintiff signed regular shipping articles abroad the said steamship as able-bodied seaman for a voyage to England and return to the United States at $62.50 per month and found.

Sixth. That on or about the 6th day of March, 1926, about a day and a half off Swansea, Wales, while the vessel was proceeding towards the United States, plaintiff was ordered to take some ashes and dump it overboard; and while so doing, and while at the rail of the vessel the seas suddenly came abroad due to the rolling of the ship, striking him in the back and driving his chest with great force against the rail of the vessel, whereby he was caused to sustain serious, severe, and, upon information and belief, permanent injuries.

Seventh. That plaintiff thereby became sick, sore, lamed, and disabled; has been and will be confined to his home and bed; has suffered and still suffers great pain and agony; has been and will be prevented from working; has lost and will have to lose large sums of money which he otherwise would have earned; has paid out and will have to pay out large sums of money for medical and surgical attendance and treatment, for medicines and for his maintenance and cure, all to his damage in the sum of $15,000.00.

6 Eighth. That said injuries were due to the negligence of this defendant, its agents, officers, and employees, in failing to provide the plaintiff with a safe and proper place in which to work; by reason of the negligence of the employees and agents of the de-

fendant in compelling the plaintiff to perform unnecessary work at a time when the seas were constantly coming over the vessel and in placing him in a dangerous and unsafe position; by reason of the condition of the vessel that the aft tanks were leaking and were full of water; that the ship was hard to manage and to steer; that the pump lines to pump the said water were clogged, were out of use and defective; that the vessel was not equipped with ash chute or appliances for the dumping overboard of ashes and other materials; that it was not equipped with small ash buckets for the use of the plaintiff in dumping said ashes into the chute and overboard; that he was compelled to and did use a large ash can which was too heavy and without adequate assistance was compelled to discharge the said ashes in a large can over the side instead of into the chute, and that thereby the vessel was rendered unseaworthy.

For a second cause of action plaintiff realleges and reiterates all the facts hereinafore set forth and in addition thereto alleges:

Ninth. That at the time of the said accident plaintiff was severely and seriously injured; that he was in need of medical treatment and rest; that the said condition was known to the officers and the master of the said vessel and that although plaintiff demanded that he be furnished medical treatment and be laid up and freed from
7 work the same was refused him and he was compelled to and did work; that he sustained hemorrhages from the mouth and the lungs which were known to the master and that he asked to be relieved from duty and be put ashore in a hospital; that such request was refused him; and that because of said allegations mentioned in this paragraph plaintiff's injuries were aggrevated all to his damage in the sum of $15,000.00.

Tenth. That under the general maritime law plaintiff is entitled to his maintenance and cure and wages to the end of the voyage, separate and district from indemnity.

Wherefore plaintiff demands judgment against the defendant in the sum of $30,000, with costs, plus a sum to provide his maintenance and cure.

SILAS B. AXTELL,
Attorney for Plaintiff,
Office & P. O. Address, 11 Moore Street, New York, New York.

8 [*Duly sworn to by Benjamin Lustgarten; jurat omitted in printing.*]

9 In United States District Court

Answer of U. S. Shipping Board Emergency Fleet Corp'n.

The defendant, United States Shipping Board Emergency Fleet Corporation, by Emory R. Buckner, United States attorney, Irving L. Evans, of counsel, answers the complaint herein, and says upon information and belief:

(A) Answering the first alleged cause of action

First. Denies the allegations contained in paragraph "second" of the complaint herein, except that it admits that the Consolidated Navigation Co., Inc., has an office and place of business in the borough of Manhattan, city and county of New York.

Second. Denies the allegations contained in paragraphs "third," "sixth," "seventh," and "eighth" of the complaint herein.

Third. Denies the allegations contained in paragraph "fourth" of the complaint herein, except that it admits that the defendant, Consolidated Navigation Co., Inc., managed and operated the
10 steamship "Coelleda" at the times mentioned in the complaint under and pursuant to an agreement, a copy of which is annexed hereto and made a part of this answer.

(B) Answering the second alleged cause of action

Fourth. Denies the allegations contained in paragraphs "ninth" and "tenth" of the complaint herein.

For a first and complete defense to the first and second causes of action the defendant, upon information and belief, alleges:

Fifth. That on or about the 20th day of January, 1926, the steamship "Coelleda" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America, and that this action is in effect a suit against the United States of America, and whatever rights, if any, the plaintiff may have by reason of the facts alleged in the complaint herein arose out of, and are founded exclusively upon the Constitution and laws of the United States of America, and particularly the act of Congress approved March 9, 1920, authorizing suits against the United States of America, in Admiralty, which act the defendant, United States Shipping Board Emergency Fleet Corporation, pleads in bar of the plaintiff's recovery in this action.

For a second and complete defense to the first and second causes of action this defendant, upon information and belief, alleges:

Sixth. That the plaintiff's employment had certain risks
11 incident thereto which were obvious and well known to the plaintiff at all the times of his employment, and also when plaintiff first entered thereon, and that said risks were assumed by plaintiff and that whatever injuries plaintiff received in said employment and which are complained of by him arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment, and during the continuance thereof.

For a third and complete defense to the first and second cause of action the defendant, upon information and belief, alleges:

Seventh. That any injuries sustained or suffered by plaintiff at the time and place or on the occasion mentioned in the complaint

were caused in whole or in part or were contributed to by the negligence and want of care of plaintiff and not by any negligence or fault or want of care on the part of the defendant.

Wherefore, defendant, United States Shipping Board Emergency Fleet Corporation, demands judgment dismissing the complaint herein with costs.

EMORY R. BUCKNER,
U. S. Attorney,
IRVING L. EVANS,
Of Counsel,
Attorney for Defendant.

United States Shipping Board Emergency Fleet Corporation.
Office & P. O. Address, 45 Broadway, borough of Manhattan, New York City.

12 To: SILAS B. AXTELL,
Attorney for Plaintiff.
Office & P. O. Address, 11 Moore Street, Borough of Manhattan, New York City.

13 [*Duly sworn to by Fergus P. Mullins; jurat omitted in printing.*]

14 In United States District Court

[Title omitted.]

Answer of Consolidated Navigation Co., Inc.

The defendant, Consolidated Navigation Co., Inc., by Irving L. Evans, its attorney, answers the complaint herein, and says upon information and belief:

(A) Answering the first alleged cause of action

First. Denies the allegations contained in paragraph "second" of the complaint herein except that it admits that it has an office and place of business in the city and county of New York.

Second. Denies the allegations contained in paragraphs "third," "sixth," "seventh," and "eighth" of the complaint herein.

Third. Denies the allegations contained in paragraph "fourth" of the complaint herein, except that it admits that it operated the steamship "Coelleda" at the times mentioned in the complaint as agent.

15 (B) Answering the second alleged cause of action

Fourth. Denies the allegations contained in paragraphs "ninth" and "tenth" of the complaint herein.

For a first and complete defense to the first and second causes of action this defendant, upon information and belief alleges:

Fifth. That on or about the 20th day of January, 1926, the steamship "Coelleda" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America, and whatever rights, if any, the plaintiff may have by reason of the facts alleged in the complaint herein arose out of, and are founded exclusively upon the Constitution and laws of the United States of America, and particularly the act of Congress approved March 9, 1920, authorizing suits against the United States of America, in Admiralty, which act the defendant, United States Shipping Board Emergency Fleet Corporation, pleads in bar of the plaintiff's recovery in this action.

For a second and complete defense to the first and second causes of action this defendant, upon information and belief alleges:

Sixth. It repeats and realleges the allegations contained in paragraph "fifth" of this answer and further alleges that the said steamship "Coelleda" at the time of the plaintiff's alleged damage and injury was being operated by this defendant as agent, under and pursuant to an agreement entered into by and between it and
16 the United States of America on the 1st day of May, 1924. At all the times mentioned in the complaint, the United States of America, as owner, was operating the said steamship for its own account, and this defendant did not man, equip or supply said steamship for its own account or by its own procurement. That the said steamship was owned by the United States of America and that the defendant was merely an agent of the United States of America and that the United States of America was operating said ship by and through this defendant as agent, was known to the plaintiff at the time that plaintiff signed shipping articles aboard the said steamship as set forth in the "fifth" paragraph of the complaint. Therefore, this defendant is not liable for any damage sustained by the plaintiff not due to the negligence of this defendant.

For a third and complete defense to the first and second causes of action this defendant, upon information and belief alleges:

Seventh. That the plaintiff's employment had certain risks incident thereto which were obvious and well known to the plaintiff at all the times of his employment, and also when plaintiff first entered thereon, and that said risks were assumed by plaintiff and that whatever injuries plaintiff received in said employment and which are complained of by him arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment, and during the continuance thereof.

17 For a fourth and complete defense to the first and second causes of action this defendant, upon information and belief, alleges:

Eighth. That any injuries sustained or suffered by plaintiff at the time and place or on the occasion mentioned in the complaint were caused in whole or in part or were contributed to by the negligence and want of care of plaintiff and not by any negligence or fault or want of care on the part of the defendant.

Wherefore defendant, Consolidated Navigation Co., Inc., demands judgment dismissing the complaint herein with costs.

IRVING L. EVANS,
Attorney for Defendant,
Consolidated Navigation Co., Inc.

Office & Post Office Address, 45 Broadway, borough of Manhattan, city of New York.

18 [*Duly sworn to by John H. McIntyre; jurat omitted in printing.*]

19 In United States District Court

[Title omitted.]

Demand for bill of particulars

SIR: Please take notice that the defendants hereby demand that plaintiff serve upon the attorney for the defendant, United States Shipping Board Emergency Fleet Corporation, within four days after the service of this notice a verified bill of particulars stating the following details, or in lieu thereof a statement under oath that plaintiff has no knowledge or information concerning them:

1. The date, month, day, and year of plaintiff's birth?
2. Who ordered plaintiff to do the specific work he was engaged in at the time of the accident as alleged in the sixth paragraph of the complaint?
3. On what date and at what time of day did plaintiff sustain injuries as alleged in the sixth paragraph of the complaint?

20 4. How many days after the SS. "Coelleda" had left Swansea, Wales, did the plaintiff sustain the alleged injuries?

5. On what deck of the vessel was plaintiff injured as alleged in the sixth paragraph of the complaint?
6. Was plaintiff on the port side or on the starboard side of the vessel when he sustained the alleged injuries?
7. State whether or not plaintiff was on the extreme after end of the said deck of the vessel at the time that he sustained the alleged injuries, and if he was not, then state in detail where, with relation to and after end of the said deck plaintiff was when he was allegedly injured.
8. Was plaintiff thrown to the deck of the vessel as a consequence of his having been struck by a wave as alleged in the sixth paragraph of the complaint?
9. Describe in detail the rail of the vessel against which plaintiff was thrown as alleged in the sixth paragraph of the complaint—whether it was a chain rail or pipe rail and high it extended above the deck; and further describe its position with relation to the side

of the vessel—whether it ran forward and aft or athwartship or diagonally.

10. Was plaintiff knocked unconscious as a consequence of his being thrown against the rail as alleged, and if so, how many hours did he remain unconscious?

21 11. If plaintiff became unconscious at the time of the alleged injury but not as a consequence of his being thrown against the rail of the vessel, state what caused plaintiff to become unconscious and the number of hours he remained unconscious.

12. Did any of the officers of the SS. "Coelleda" witness the alleged accident, and if so, what officers?

13. If the plaintiff became unconscious at the time of the alleged accident, which of the officers of the SS. "Coelleda" first saw plaintiff after he gained consciousness and where was plaintiff at that time?

14. Describe in detail the size, the contents, and the weight of the container plaintiff was dumping at the time of the alleged accident.

15. Is it alleged that no small buckets were on board the vessel available to the plaintiff at the time, for the work he was engaged in at the time of the alleged accident?

16. How the failure of the vessel to be equipped with ash chutes caused the alleged accident as alleged in the eighth paragraph of the complaint.

17. What appliances are meant where it is alleged in the eighth paragraph of the complaint "that the vessel was not equipped with ash chute or appliances for the dumping overboard of ashes and other materials"?

18. In what respects was the place in which the plaintiff was working an unsafe and improper place as alleged in the eighth paragraph of the complaint?

22 19. How did the alleged leak, the alleged clogged pipe lines, and the difficulty of steering the ship cause the alleged accident, as alleged in the eighth paragraph of the complaint?

20. On what date and at what time of day is it alleged plaintiff returned to work after the alleged accident?

21. How many days after the alleged accident did plaintiff return to work as alleged in the ninth paragraph of the complaint?

22. Who ordered plaintiff to return to work as alleged in the ninth paragraph of the complaint?

23. Is it alleged that plaintiff worked as second cook after the alleged accident, and, in any event, of what did plaintiff's duties consist at that time?

24. When was plaintiff's request to be put ashore in a hospital refused him as alleged in the ninth paragraph of the complaint and by whom?

25. Did plaintiff receive any medical treatment at any time after the alleged accident and if it is alleged that he did receive medical

treatment then state the name of the persons and/or officers who attended plaintiff and further state of what the treatment consisted?

26. Is plaintiff's eyesight injured as a consequence of the alleged accident and if so then state in detail the facts which caused the alleged injury to plaintiff's eyes?

23 27. Is it alleged that plaintiff is tubercular as a consequence of the alleged injury and if it is so alleged then state in detail the facts which caused plaintiff's tubercular condition?

28. State the names and addresses of all of the doctors who have treated plaintiff since the date of the alleged accident and further state the dates on which or between which plaintiff received treatment or was examined by each of them.

29. State the names and locations of all the hospitals in which plaintiff has been treated since the date of the alleged accident, and further state the dates he entered and was discharged from each of them, either as an in or out patient.

30. State the nature, location, and extent of each and every injury set forth in the complaint which plaintiff claims resulted from the alleged accident.

31. Which of said injuries does plaintiff claim to be permanent?

32. An itemized statement of the sums of money necessarily expended by the plaintiff or for which the plaintiff necessarily became liable for medicines, medical attendance, or for maintenance and cure in endeavoring to be cured of the alleged injuries.

33. An itemized statement of any other moneys plaintiff has lost or expended as a consequence of the alleged accident.

24 34. An itemized statement as to how plaintiff arrived at the sum of $50,000 as the amount of damages.

Dated New York, March 9, 1927.

Yours, etc.,

EMORY R. BUCKNER,
U. S. Attorney.

EDGAR G. WANDLESS,
Attorneys for Defendant.

Office and P. O. Address, 45 Broadway, Borough of Manhattan, New York City.

To: SILAS B. AXTELL,
Attorney for Plaintiff.

Office and P. O. Address, 11 Moore Street, Borough of Manhattan, New York City.

25 In United States District Court

[Title omitted.]

Bill of particulars

Plaintiff, for his bill of particulars, upon information and belief, respectfully alleges:

1. 15th day of November, 1907.
2. Chief cook.
3. On or about the 5th or 6th days of March, 1926, at approximately 6.35 p. m.
4. About two and a half days.
5. Midship deck.
6. Port side.
7. Yes; he was standing on the midship deck.
8. Struck by sea and bucket and crashed him to a part of the ship.
9. A pipe rail, about 4½ feet high forward and aft to defendant's vessel.
10 & 11. Ash can struck plaintiff knocking him unconscious and defendant knows how long he remained so.
26 12. Plaintiff thinks not.
13. Second mate and plaintiff was in the ship's hospital.
14. Three feet high containing ashes and garbage and weighing approximately 250 pounds.
15. It is.
16 & 17. Need not be answered; argumentative.
18. In every respect as alleged in paragraph eight in complaint.
19. Need not be answered; argumentative.
20 & 21. About two days after the accident around noon time, but the plaintiff was too sick to work, and was taken back to the hospital and remained there another two days.
22. Captain.
23. Worked in galley as second cook.
24. By the captain, on getting to Azores.
25. No, except after American consul took him off the Coelleda at Azores.
26. Yes.
27. Yes; neglect of treatment and injury to ribs and lungs.
28 & 29. Need not be answered, as that is evidence.
30 & 31. Defendant has the information in the various reports and affidavits that were served on them in our moving papers for a preference.
32. Over $2,000.
33. $1,500.
27 34. Need not be answered at this time.

Dated, New York, April 1st, 1927.

SILAS BLAKE AXTELL,
Attorney for Plaintiff.

11 Moore Street, Borough of Manhattan, New York City.

To: EMORY R. BUCKNER,
U. S. Attorney,
EDGAR G. WANDLESS,
Of Counsel,
Attorneys for Defendants.

45 Broadway, New York City, N. Y.

[*Duly sworn to by Benjamin Lustgarten; jurat omitted in printing.*]

28 In United States District Court

[Title omitted.]

Supplemental bill of particulars

Further answering the demand for a bill of particulars, pursuant to an agreement made between counsel this day, plaintiff alleges upon information and belief:

25. That plaintiff was at the rail of the vessel on the midship deck at a point which he believes was the after end of the said deck and at a point where the ashes were customarily dumped on the said vessel. When he was struck by the sea, there was no ash chute provided on the ship at that place at that time. He was struck by the sea and knocked unconscious and believes that he was washed to some other part of the ship and may have sustained other injuries to his body at other places.

26. Plaintiff's eyesight was injured in consequence of the accident; that the injury to his eyesight came from a blow on the forehead as he is informed and believes that said blow caused him to become unconscious for a period of time, and he is informed and be-
29 lieves that there is some permanent injury to his brain, nervous system, etc., and that his eyesight as a result thereof has become seriously and permanently impaired.

31. Plaintiff claims that he has received serious and permanent injuries to his eyesight, brain, nervous system, ribs, lungs, and in and about the torso, and undernourishment by being compelled to work after the accident when he was unfit; brutal treatment generally, on board the ship by the master, who was a person unfit to be a master of a ship where the crew is composed of white men. He has contracted a disease known as tuberculosis. That said condition of tuberculosis which is incipient and which plaintiff is informed and believes is a permanent condition, but hopes not. Plaintiff received an injury to his forehead where he still has a scar and which seems to be permanent. He injured the bones of his skull, has scars upon his shoulder and neck on the right side, which he believes were caused by burns from hot coals which were in the ash can when the sea struck him. Two or three of his teeth were also broken in the

upper jaw. The little finger on the left hand was broken. Plaintiff was bruised and pinched about the neck by the master, while he was lying sick in his bunk on one occasion, thus sustained the injuries, although those injuries were not itself permanent, but that said brutal treatment has resulted in aggravating the condition of his lungs, which were injured by the blow of the sea and ash can, etc.

32. For board and lodging there has already been paid, or which the plaintiff has contracted to pay or still owes, $25.00 a week from March, 1926, to date, with the exception of about one month
30 while he was in the United States Marine Hospital, approximate sum of $1,100.00; to Dr. Rubin of Philadelphia $35.00; to Dr. Chester of Atlantic City $30.00; to Dr. Buden of Philadelphia $40.00; to Drs. McPhee, Alger, Power, fees to date approximately $100.00 not paid. There is owing to Mr. Helfin, a druggist of Philadelphia, approximately $50.00. Plaintiff has paid for drugs and various medicines on prescriptions, etc., $23.00. Also railroad fare from and to Philadelphia, Atlantic City, Providence, New York, care and attention in getting about, necessary to his care and treatment, approximately $50.00. Plaintiff estimates that he will be an invalid and have an expense of not less than $50.00 per week for several years to come, if he is to be restored to good health, but he is informed and believes that he will not be restored to the condition he was in before the accident.

33. That plaintiff has lost by reason of the injury the value of his services since the end of the voyage. He states that his earning capacity at the time of the accident was fully if not more than that indicated by the articles of the ship. His wages at the time of the accident were $80.00 per month, plus his board and lodging, which is reasonably worth $75.00 per month, his total earnings amounted to about $155.00 a month, or $1,800 per annum; therefore he has lost for being entirely incapacitated the sum of $1,800 in wages.

Defendant will please take further notice that inasmuch as the plaintiff has served a notice under date of February 26, 1927, that upon the trial of this action he will move to increase the amount of damages from $30,000 to $50,000, he will ask the Court to
31 add $10,000 to each cause of action, making the total amount of each cause of action $25,000.00.

Dated New York, April 8th, 1927.

SILAS B. AXTELL,
Attorney for Plaintiff.

Office & P. O. Address, 11 Moore Street, New York, N. Y.

To CHARLES H. TUTTLE,
U. S. Attorney,
EDGAR G. WANDLESS,
Of Counsel,
Attorneys for Defendant.
Office & P. O. Address, 45 Broadway, New York, N. Y.

32 [*Duly sworn to by Silas B. Axtell; jurat omitted in printing.*]

33 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Judgment

The issues in the above entitled cause having been duly brought on for trial before the Honorable Thomas D. Thacher, district judge, and a jury, on the 15th, 16th, and 17th days of June, 1927, at a trial term of this court held at the United States Courthouse in the Old Post Office Building, borough of Manhattan, city and State of New York, the defendants having appeared by counsel, the first cause of action in the complaint having been dismissed by the court on the 16th day of June, 1927, the issues in the second cause of action having been duly submitted to the jury on the 17th day of June, 1927, and the jury having duly rendered a verdict in favor of the plaintiff and against the defendants in the sum of ten thousand ($10,000.00) dollars and costs, and counsel for defendants having made a motion for a new trial and to set aside the verdict, and the court after due deliberation having denied said motions, and the costs of plaintiff, having been duly taxed in the sum of $226.50,

34 Now, on motion of Silas B. Axtell, attorney for plaintiff, it is hereby

ORDERED, adjudged, and decreed that the plaintiff, Benjamin Lustgarten, an infant, by his guardian ad litem, John A. Lydecker, recover of and from the defendants, United States Shipping Board Emergency Fleet Corporation and Consolidated Navigation Co., Inc., the sum of ten thousand ($10,000.00) dollars as found by the jury, together with $226.50, costs as taxed, amounting in all to the sum of $10,226.50, with interest thereon until paid, and that the plaintiff have execution against the said defendants, their goods, chattels, credits, and lands to satisfy this judgment therefore.

Judgment signed and entered this 22d day of July, 1927.

ALEX. GILCHRIST, Jr., *Clerk.*

35 In United States District Court

[Title omitted.]

Bill of exceptions

Before Hon. THOMAS D. THACHER, J., and a jury

NEW YORK, *June 14, 1927.*

[Appearances of counsel omitted in printing.]

A jury was impaneled and sworn.

Adjourned to Wednesday, June 15, 1927, at 10.30 a. m.

36 NEW YORK, N. Y., *June 15, 1927.*

[Trial continued]

Plaintiff's opening

Mr. AXTELL. If the court please, and gentlemen of the jury. The facts in this case that we expect to prove are as follows:

The plaintiff, a boy about eighteen or nineteen years old, was an able seaman, had had three years' experience on the steamship "Coelleda" of the defendant company. She made a trip to Swansea, Wales, where she loaded coal. On or about the 5th or 6th day of March, while she was some two or three days out of Swansea, and being overloaded, being unseaworthy due to a leak in her afterpeak, and unwieldly and unsteerable, going off as many as fifteen or twenty degrees, or 20 or 30 points, taking seas on her leeside and in her windward side, unable to keep her nose properly into the storm which was going on, this boy was ordered by the chief cook, he then having been promoted from the job of able seaman to second cook, to dump very large, heavy can of ashes over the side.

This vessel is of unusual construction. She is one of the Hog Island vessels, of which there were some fifty or so, made at a tremendous expense (for which this defendant was not to blame), but they had an unusual construction, in that the rail, where these ashes had to be dumped, was set in some eighteen inches from the edge of the vessel.

As a rule, in fact practically all, vessels carry what is known as a garbage chute or ash chute for the use of the men in the gallery to dump the ashes at sea. Some of them are made of galva-
37 nized iron with a canvas on the end to keep it from blowing up on deck, and so it will get down into the water without coming back on to the ship. This vessel was constructed, as designed in the beginning, to have a heavy, cast-iron structure permanently located on each side of the vessel to carry these ashes and garbage over this extension. In other words, the rail—I will show it to you as soon as I get a picture here. I guess we can use this picture to illustrate and make it easier. It is not in evidence but it will be.

This shows the vessel adjacent to the rail looking aft [indicating]. Here is the end of an alleyway that runs athwartships, or across the vessel. A man comes down on the inside and he has got to get the ash can out over that pocket [indicating].

While attempting to do this and while holding this heavy can, which he managed to get there alone somehow on top of the rail, one foot through the rail, the vessel got on the other side of the wind and a big sea came aboard, caught the can and him and crushed the can down on top of him injured him in this part [indicating] by pressing him against the rail below, washed him somewhere and struck his head against something and knocked him unconscious.

As a result of that, he was incapacitated, but the captain of the ship came, and took him out of the hospital, and compelled him to work, taking him forcibly from the place where he was sleeping or lying and into the galley and putting him at work.

He had already had hemorrhages from the mouth which is believed to have come from some lesion in the lungs due to the injury or the crushing that he had in this wash of the sea. No ribs were actually broken, as far as we can find out; at least, the X-ray plates do not disclose it, but he was required to turn to in that condition.

38 He was partially blind from shock or something, some injury to the nerve in one eye, and I guess both eyes are still in that condition. At the present time he is in the condition of incipient or perhaps advanced tuberculosis, and it is claimed that this condition is due, not only to the injury that occurred at that time, but to neglect on the part of the master in requiring him to work, instead of letting him lay up. He was taken off the ship by order of the consul at Azores where the vessel put in.

The vessel was in an unfit, unseaworthy condition; took 28 days to cross; was overloaded with coal before she began to leak, or before the leak filled her afterpeak full of water, and we say that the negligence here that caused the condition that this boy is in was threefold.

First, in not rendering the ship seaworthy and maintaining her that way during the voyage.

Secondly, in not having an ash chute. That is another element of seaworthiness.

And, third, in requiring him to carry this heavy can, unassisted, and dumping it; failing to have proper or smaller vessels in which the ashes could have been carried to the rail and thrown through. That is also alleged here as part of the negligence.

Then, of course, a separate cause of action of neglect to give proper treatment after the injury was incurred.

Now, I want to move——

Mr. LANDIS. Just a minute. I have not opened yet.

Mr. AXTELL. Go ahead.

39 *Defendant's opening*

Mr. LANDIS. May it please the court and gentlemen. Whatever Mr. Axtell and I may say at this time, of course, is not going to influence you in the eventual verdict you are going to bring in, because you are going to take account of the evidence. All our object is to put the two respective stories before you, to give you some idea of what is coming. If we agreed with what Mr. Axtell has just told you, we, of course, would not be in court.

As a matter of fact, we deny everything practically. We deny, in the first place, that any accident occurred to this individual as claimed. We deny that he was struck by a wave. We deny, further, that he was made to work. We admit that the man had a certain illness, apparently contracted in the service of the vessel, but probably due to an accident he had had several years previously on another ship. Immediately that accident was reported that man was relieved from duty. He was taken out of the galley, and, as a matter of fact, requested the chief officer of the vessel to be permitted to go back to work on deck. That is, the deck force being distinguished from the cook's room, you see; and he wanted to go to work as an A. B. instead of a second cook, and the captain said, "No."

He was put off the ship at the Azores and placed in a hospital there. We deny that the ship was unseaworthy. The ship was not unseaworthy. These fifty or more Hog Island ships which the Government built during the war and which did cost considerable money, as I understand it, were some of the best vessels, if not the best vessels, the Government ever built. They have an unusual factor of safety, because they were built with water-tight bulkheads to prevent their sinking in the event they were torpedoed in one particular place.

Mr. AXTELL. All vessels have that.

Mr. LANDIS. Well, let me finish my opening.

These Hog Island ships are in every way fit ships, and I think that the court will rule out any talk on their construction.

As far as the ash chute is concerned, an ash chute is primarily intended to keep the vessel clean. It is not a safety device, and we are going to produce experts' testimony that will, I believe, convince you of that fact.

Now, with regard to this matter of a leak in the stern of the vessel. We admit that she left Swansea with a slight leak in the stern. These vessels quite often leave port with weeping rivets or slight leaks. It is not unusual at all, and we will convince you of that fact, I believe, by expert testimony.

This leak at the time the vessel left Swansea was of very slight concern. It did not make her unseaworthy in any regard. She was not overloaded, as Mr. Axtell says. She was loaded just about down to her marks. As a matter of fact, in England the board of trade won't permit a vessel to sail if she is loaded below her marks. And she was properly loaded; that is, she was properly trimmed. She was down at the stern. She was not more deeply loaded at the stern than she was at the bow; however, the trim was a matter of 13 inches. That is, she was 13 inches lower at the stern than she was at the bow.

Now, it is much better for the steering of a ship to have a little more trim. However, it was impossible under these circumstances,

because they had to take a full cargo. All ships will take full
41 cargoes every time they can, of course. Consequently the engineer in using the water—they use water and fuel, of course, as they proceed on a voyage, which makes the ship lighter; and by the time this accident was supposed to have happened the ship had used about one hundred and some odd tons of fuel and water. These were used in the forward end of the ship so as to lighten the forward end and bring her up and be able to permit her to buck the heavy seas much better and prevent her taking water over the forward decks, you see. The water in the stern was thought by the ship's officers to be a good thing. There were only nine tons in there at the time this accident was supposed to have happened, which had really no appreciable effect on her draft, you see, except perhaps to put her down about a half an inch more at her stern than she would have been without it in there. But with those nine tons or so of water in her afterpeak, which is at the immediate stern of the vessel, and the water and fuel which had been used, lightening her at the peak, gave her a better trim than she had had at the time she sailed and at the time of the happening of this accident than she perhaps had for the rest of the voyage.

Mr. AXTELL. I move, in accordance with the notice served on the 26th of February, 1927, for leave to amend the complaint by changing the words "$30,000" to "$50,000" in the prayer for relief in both causes of action.

Mr. LANDIS. If your honor please, I would like to have Mr. Axtell designate how much of that additional $20,000 is for the first cause of action and how much is for the second cause of action. He sued originally for $30,000.

Mr. AXTELL. Ten thousand on each.

The COURT. Is there any objection to that?

42 Mr. LANDIS. No, I do not think so.

Mr. AXTELL. That amendment is made on account of the changed condition of the man since the action was commenced.

BENJAMIN LUSTGARTEN, the plaintiff herein, called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. I am going to stand over here and ask you to talk loud enough so I can hear you. Speak so these gentlemen over here [indicating] can hear you without straining their ears.

Q. Now, then, you are the plaintiff in this case? A. Yes, sir.

Q. I can not hear you. A. I said yes, sir.

Q. I can't hear you. A. I said yes, sir.

Q. Can't you talk louder than that? A. I said yes, sir.

Q. Talk louder. Are you feeling very well today? A. Nervous.

Q. What? A. Nervous.

Q. Well, do you always talk as low as that? A. Yes, sir, all the time.

Q. You never talk louder? A. No.

Q. How old are you? A. I am 19 years old.

Q. When will you be twenty? A. November 15, 1927.

Q. I can't hear that? A. November 15, 1927.

Q. What was your occupation? A. I was an able-bodied seaman.

Q. How long did you go to sea? A. About three and a half years.

43 Q. Are your father or mother living? A. No.

Q. Were you a member of the crew of the steamship "Coelleda"? Answer yes or no A. yes, sir.

Q. What was your job on that ship? A. I was an able-bodied seaman.

Q. What were your wages on that vessel? A. 62.50.

Q. Did you get your board and lodging besides? A. I got my board and lodging, yes, sir.

Q. Just say yes or no to all questions. If I need any more information I will follow it up. Now, did you take the job of second cook while the vessel was in Avonmouth, England? A. I did.

Q. Yes? A. I did.

Q. What wages did you receive in that job? A. I received $80 a month. I received eighty.

Q. And your board and lodging? A. And my board and lodging.

Q. Do you remember the month or year when this employment took place? A. I remember it was in 1926 but I don't remember what month.

Q. About what time of the year? The complaint alleges that—Well, did you have an accident on the ship? A. I had an accident, yes, sir.

Mr. LANDIS. If your honor please, I would, I would like to ask that the plaintiff's witnesses be excluded from the court room while this witness is testifying.

The COURT. Is there any objection?

Mr. AXTELL. To what?

Mr. LANDIS. I would like to have the plaintiff's witnesses excluded from the court room while he is testifying.

Mr. AXTELL. Are there any of the defendant's witnesses here?

Mr. LANDIS. This gentleman here.

44 Mr. AXTELL. This gentleman is not a material witness as to facts, is he?

Mr. LANDIS. No.

Mr. AXTELL. No objection to his staying.

The CLERK. All other witnesses kindly remain outside the court room.

Mr. AXTELL. I do not think they can possibly hear because I cannot hear from here. But if the Government wants them out in the hall, that is their privilege.

Q. Do you remember where the vessel was at the time the accident occurred? A. It was on the second or third day out of Swansea, Wales.

Q. What were the weather conditions at the time? A. It was fairly heavy weather.

Q. Do you know what the condition of the ship was? A. She was leaking in her afterpeak and in her lazarette?

Mr. LANDIS. If your honor please, I am going to object to this unless he is required to state the ground of his knowledge.

Q. Well, what knowledge do you have? How do you know she was leaking? A. Well, I was back aft and in the forecastle because the captain wouldn't let me stay——

Mr. LANDIS. If your honor please, that is not responsive to the question.

Mr. AXTELL. He is trying to tell what knowledge he had.

By the COURT:

Q. What did you personally know about the ship leaking; something somebody had told you? A. I had been living right over the top——

45 Q. What did you know of it? A. Every time I came down in the forecastle I could see the water swishing around.

By Mr. AXTELL:

Q. Did you ever look in that lazarette? A. Every night until the time of the accident.

Q. When did the leak begin? A. It was leaking while we were laying alongside the dock in Swansea, Wales.

Q. Before or after she began to load? A. After she began to load.

Q. What was she loaded with? A. She had a castle.

Q. Had what? A. A castle.

Q. What was she loaded with, I said? A. Oh, coal. She had a castle——

Q. How deeply was she loaded? A. She was loaded up to her waterline. I didn't notice whether up to the Plimsoll mark.

Q. Do you know whether she had one or not? A. I think she did.

Q. Did you ever see it before this time when she was loaded? A. Yes, sir.

Q. Did you see it after she was loaded? A. No, sir.

Mr. LANDIS. If your honor please, let us find out exactly when he didn't see it after it was loaded. He said he did not know, a moment ago, whether it had a Plimsoll mark or not. Now, he has said, under the guidance of counsel, that he did see it before it was loaded and after it was loaded.

Mr. AXTELL. I think you misunderstood. We will have the stenographer repeat that.

46 Mr. LANDIS. He just said he did not know whether she had a Plimsoll mark or not.

Mr. AXTELL. Counsel is quoting evidence now, and I would like to have that evidence read.

(Record read by the stenographer.)

Mr. LANDIS. I object to that on the ground that it indicates that it was loaded below the Plimsoll mark when he did not know, as a matter of fact. He did not remember seeing it at the time when it was loaded.

The COURT. He could not see it if it was loaded below.

Mr. LANDIS. And it was not loaded below, if your honor please. That is the implication the jury gets from this. I would like to have him state when he looked at the Plimsoll mark.

The COURT. You may develop that on cross examination. Objection overruled.

Mr. AXTELL. There will be lots more evidence and you can go into it.

Mr. LANDIS. May I have an exception, if your honor please?

The COURT. Go ahead.

By Mr. AXTELL:

Q. What observation did you make of this particular loading? A. I wasn't sure that night when I come back to the ship and the ship was loaded, just right alongside of the dock. You couldn't see the waterline unless you went on the offshore side.

47 Q. Did you notice how she was taking the seas before your accident? A. On the starboard side; that she was——

Q. About how much on the starboard side? A. About half a point or a point.

Q. Did you notice how she was steering? A. She was steering very badly.

Q. What do you mean by that? A. She was always a bad steering ship.

Q. Have you ever steered her? A. Yes, sir.

Q. You have steered her yourself? A. Yes, sir.

Q. On the way over? A. On the way over.

Q. Did you notice how she was steering on the day that you got hurt? A. I looked back in the morning, after I came back——

Q. Answer yes or no, Mr. Lustgarten? A. Yes, sir.

Q. Always stop and think and say, "Can I answer this yes or no"? If you can, answer it that way, because otherwise we will have a lot of evidence here that we will have to strike out.

The COURT. That will be my province. Go ahead.

Mr. AXTELL. Excuse me.

Q. Now, how was she steering? A. Very badly.

Q. Describe what you mean by that? A. She would swing off anywheres from 15 to 20 degrees, or 10 degrees before you could catch her. It was a ship that would either carry a half a turn a-port wheel, or half a turn a-starboard wheel. It was either swinging more to port and carrying her starboard or just the opposite. In

fact, one watch she would swing port and one watch would swing starboard.

Mr. LANDIS. If your honor please, I move to strike all this
48 out. All we are concerned with is how she was steering at the time this accident occurred, and this witness is testifying how she was steering at other times. Yesterday he said he did not know how she was steering at the time the accident occurred.

The COURT. I will let it stand for the present; I will not strike it out.

Mr. LANDIS. May I have an exception?

Q. Did you observe how much she was swinging out of line on the day of the accident? A. In the morning I did.

Q. Did you observe how she was steering the day before? A. I did.

Q. And the day before that? A. I did.

Q. Now, describe the way she was steering; what you observed on those days? You were not then, I take it, a helmsman; you were a cook?

Mr. LANDIS. I object to this, if your honor please, on the grounds that however she may have been steering at those times is of no consequence in this case. The only question is——

The COURT. I will overrule that. You may reserve the motion to strike out after the plaintiff's testimony is in.

Mr. LANDIS. I will reserve the motion.

A. The ship was swinging when she came out of the dock. She was—she had tugboats and when she got out of the locks into the Bristol Channel then you could notice from her wake that she was steering very badly.

Q. Did it improve any from that time on till the time of the accident?

49 Mr. LANDIS. Just a moment. I am going to move to strike that testimony out, if your honor please. It seems to me it is peculiarly prejudicial because his testimony how she may have steered on the first day out of Swansea creates an effect upon the jury, certainly, that she was doing that all the time. The only question that is really material here is whether she was steering that way at the time this accident occurred, because Mr. Axtell is going to connect up this swinging of the ship, by reason of the fact that she was yawing around, because they couldn't steer her, and the ship not being in line at this particular moment——

The COURT. I do not know what he is going to try to do. I will rule as before, overrule the objection.

Mr. LANDIS. May I have an exception?

Q. Now, getting down to the day of the accident and at the time of the accident; what time of day was it? A. It was right after supper, between 6 and 7.

Q. You were then second cook? A. Second cook; yes, sir.

Q. Who was the chief cook? A. There was some Spanish fellow.

Q. What were his duties and what were your duties? A. Well, his duties were to do the cooking and my duties the baking and the cleaning of the galley with the help of the chief cook.

Q. Now, did you get orders from anybody in your work? A. From the chief cook.

Q. Your answer is "Yes," I take it? A. Yes, sir.

Q. Who gave you the orders? A. The chief cook.

50 Q. Did you get orders from anybody else? A. No, sir.

Q. You received all your orders from him? A. Yes, sir.

Q. Did he give you any orders that day? A. He gave me——

Q. Yes or no. Did he give you orders that day? A. Yes, sir.

Q. What orders did he give you that day? A. You mean in the morning.

Q. Any time that day? Just in a general way what orders did he give you that day? A. Well, he told me to set a batch of bread at 7 o'clock in the morning, make my puddings at 8.

Mr. LANDIS. If your honor please, I am going to object to this now. This is certainly not anything that has anything to do with it.

The COURT. I do not see what possible bearing it has.

Mr. AXTELL. All right.

Q. Did he give you any order with reference to dumping ashes? A. He told me to clean the stove.

Q. Yes or no? A. Yes, sir.

Q. What order did he give you? A. He told me to clean both fires in the stove and not to leave them burn overnight because we were saving that special coal she had for the galley.

Q. Did he give you any other orders about it? A. He hold me to take all the ashes out and dump them overboard.

Q. Did you have any tools or appliances with which to do that? A. We had a large can.

Q. Describe the can? A. The can was between two and three feet high and about a foot and a half in diameter.

51 Q. Was there anything else provided? A. There was not, sir; no sir.

Q. Were there any smaller buckets or pails there to use for that purpose? A. No, sir.

Q. Were there any provided while you were on the ship in that capacity? A. No, sir.

Q. What were you told to do with the ashes? A. I was told to dump them overboard.

Q. Tell everything that occurred from then on, the conversation you had with the chief cook about it, and what you did? A. It was just at supper time, after supper was served——

Q. A little louder. A. Just at supper time, after supper was served and everything was just about finished in the galley, the chief cook and myself were going to eat and the chief cook asked me to dump the ashes overboard before they got cold, because they stuck

to the side of the stove. And I went into the galley and emptied both fires, put them in this can, and it was very heavy, and I asked the chief cook if he would help me dump it over the side.

Q. What did he say? A. He said "No." He says "I am eating supper now." He says, "That is your job anyway."

Q. What else did he say, if anthing, then? A. Then he didn't say anything——

Q. A little louder. A. He didn't say anything and I took the can and dragged it out of the galley to the side of the ship and then I had to lift it over the rail and get the can over.

Q. I show you a picture that is marked "Plaintiff's Exhibit 2" in blue pencil; is that a picture of the side of the ship at the point where you were dumping the ashes? A. It is the same side; yes, sir.

52 Q. There is a man standing in front of the rail at that point? A. Yes, sir.

Q. How much space is there at that place? A. You mean the walkway?

Q. That is, how wide a place is the rail there where you dump the ashes? A. Between the rail and the side of the ship?

Q. Yes. Where is this place located, anyway? A. It is on the port side of the ship.

Q. Port side where? A. Of the ship.

Q. Where abouts on the port side? A. In the amidship deck; in the after part of the amidship deck.

Q. On the after end of the amidship deck? A. Yes, sir.

Q. Is this a sketch that you handed into me this morning? A. Yes, sir.

Q. Which you meant to use to illustrate where you got hurt? A. Yes, sir.

Q. Can you show us with this? A. Right here [indicating].

Q. That is the flat deck [indicating]? A. Yes.

Q. Let us take first this: What is this supposed to be, the ship, whole length and everything? A. Yes, sir.

Q. That is your conception of it, is it? A. It is straight fore and aft.

Q. This point you marked up here with an X——

The Court: Step down and show the jury.

(Witness does as requested.)

Q. Does this place that is marked with an X indicate the after end of the amidship deck, as you call it? A. Yes, sir.

53 Q. Now, is this plan down here supposed to be a floor plan looking down on the after end of the amidship structure? A. Yes, sir.

Q. Can you show us there where it was you got hurt? A. Here is the port alleyway, here is the galley and here is a door [indicating].

Q. Just make marks where you are calling off those things. Just put that pencil down again so I will know where you mean. A.

[Indicating.] Here is a door for the port alleyway; here is a doo leading out of the galley [indicating].

Q. Just let me mark that.

Mr. LANDIS. If you honor please, I object to this plan. It is no accurate and it is not true. The mess room is not in this position.

The COURT. That is not for you to say.

Mr. LANDIS. He is showing it to the jury.

Mr. AXTELL. I concede that this boy made it and gave it to me.

The COURT. You will have to lay the foundation.

Q. Just put a mark——

The COURT. You will have to lay the foundation before you sho it to the jury.

Q. Did you make this drawing? A. Yes, sir.

Q. Is that the best drawing you can make of that ship? A. It i an exact drawing.

By the COURT:

Q. Does that fairly represent your recollection of the arrange ment? A. It is the absolute drawing as to the galley and the alley ways and the mess rooms, are true as they were in all Hog Islan ships.

54 The COURT. It may be received in illustration of his testi mony.

Mr. AXTELL. I ask that it be marked "Plaintiff's Exhibit 1."

(Marked "Plaintiff's Exhibit 1").

By Mr. AXTELL:

Q. Now, this part here which you have drawn up in front, yo have made a pen mark "A." Do you see that? A. Yes, sir.

Q. What was the place marked A? A. It is the port alleyway.

Q. The port alleyway. What is this over here [indicating]? A It is the galley.

Q. Mark something there, put a B there. A. [Witness does a requested].

Q. That is B. That is meant to be the galley. Now, there i another arrow there. What is this [indicating]? A. This is th starboard alleyway.

Q. You have got the alleyways too wide. That was the trouble with Mr. Landis. Now, then, you came out of the galley and went where with that bucket? Does that dotted line you have drawn there indicate where you went [indicating]? A. Yes, sir.

Q. That is, you came out of that door, out of this alleyway and down the deck? A. Yes.

Q. And this strip down the deck, that is the same kind of alley way? A. That is the walk.

Q. There is a rail to the deck? A. There was.

Q. We will call this rail R. That looks aft on the ship, doesn't it? A. Yes.

Q. Make an arrow pointing aft, and this would be forward up here. Mark that "F" for forward. A. [Witness does as requested.]

55 Q. This would be the port side and this would be the starboard [indicating]. Now, how wide is that alleyway back here that you walked along? A. About two and a half, three feet.

Q. Show us with your hands. A. [Witness does as requested.]

Q. That is about three feet, I should think. You got down to this point [indicating]. Can you see this? A. Yes, sir.

Q. Now, that place there; what is there across there? A. There is a rail.

Q. Is that the rail that is shown on this photograph which has already been marked "Plaintiff's Exhibit 2"? These rails, can you see them? A. Yes, sir.

Q. That is the place, is it? A. Yes, sir.

Q. From one end to the other of that railing, as far as you can see it on this picture, is how long? A. Three feet.

Mr. AXTELL. I offer this photograph as "Plaintiff's Exhibit 3." It is already marked.

(Marked "Plaintiff's Exhibit 2" in evidence.)

Q. Now, I show you another photograph marked "Plaintiff's Exhibit 3" and I ask you what this is? A. Looking from forward to aft on the port side of the ship; looking back aft.

Q. Where was the camera when that was taken? A. Forward.

Q. Was it on the outside of the vessel? A. It was on the outside of the ship.

Q. That is, of this rail or what you call it, walkway, that goes along there? A. Walkway. He must have been on the outside of the rail.

56 Mr. AXTELL. I offer that as plaintiff's Exhibit 3.

(Marked "Plaintiff's Exhibit 3" in evidence.)

The COURT. We will take a recess until 2.15.

Afternoon session

BENJAMIN LUSTGARTEN resumed the stand.

Direct examination by Mr. AXTELL (continued):

Mr. AXTELL. I will offer the operating contract as plaintiff's Exhibit 4.

(Marked "Plaintiff's Exhibit 4" in evidence.)

Q. Now, I show you another picture and ask you if that is a photograph of the place where you were dumping the ashes? A. It is, sir.

Mr. AXTELL. I offer that in evidence as plaintiff's Exhibit 5.

(Marked "Plaintiff's Exhibit 5" in evidence.)

Mr. AXTELL (handing plaintiff's Exhibit 5 to the jury). This is looking outboard and that is the place, which is the port side.

Q. I show you another picture and ask you if that is a picture of the ship taken from a dock showing the port side of the vessel at the point where the ashes were being dumped? A. It is.

Q. These ink marks on there show about the place where
57 you were actually engaged in doing the work? A. Yes, sir.

Mr. AXTELL. I offer that as plaintiff's Exhibit 6.

[Marked "Plaintiff's Exhibit 6" in evidence.]

Mr. AXTELL. That just shows a view looking at the side of the ship. You see, that is the after end of the amidships structure [handing exhibit to the jury].

Q. Was there any ash chute attached to the vessel or provided on the vessel at that place where you were dumping the ashes? A. Well, there was no ash chute at the place where it was supposed to be, but there was—they had an ash chute there in the forecastle.

Mr. LANDIS. If your honor please, I move to strike that out.

The COURT. Strike it out.

Q. Mr. Lustgarten, if you will just confine yourself—I tried to tell you this morning. Answer questions yes or no and say no more.

Q. Was there any ash chute at the place where you were dumping the ashes at that time? A. There was none.

Q. Was there any ash chute on the other side, the starboard side, of the ship at that time? A. There was not.

Q. Had there been any ash chute provided on the ship at that place at any time during the voyage? A. There was not.

58 Q. Did you ever see any ash chute on that ship? A. I seen one in the forecastle head, underneath the forecastle head in the fore peak.

Q. What was it made of? A. Galvanized iron.

Q. Was it ever in use on this ship? A. Not that I ever seen it.

Q. Have you seen ash chutes on other vessels? A. I seen ash chutes on every ship I have been on.

Q. Or garbage chutes? A. I have seen ash chutes on every ship I have been on.

Q. Describe them; what they are made of and how they are constructed? A. On some ships they have an ash chute made out of wood and a piece of canvas at the end of it, and they used to put it on the lee side of the ship to dump ashes overboard so that they won't get the ship's side dirty and for safety of the man in case—in that case it does not——

Mr. LANDIS. If your honor please, I move to strike out that "for the safety of the men."

The COURT. Strike it out.

Q. Well, you have seen them in use on other vessels? A. Yes, sir.

Q. Did you make any request for the use of an ash chute on this ship? A. I asked the chief cook.

Q. What did you say to him? A. I told him we ought to have an ash chute on the day—on the day before, and he told me that they didn't have any on it since he has been on and he wasn't going to bother putting up any now.

Q. Well, did you ever ask for any smaller utensil or bucket with which to handle the ashes in dumping them than that which you had at that time?

Mr. LANDIS. If your honor please, I would much prefer Mr. Axtell did not lead the witness quite so much.

59 The COURT. I do not think you ought to lead him. He had a conversation which you can ask for.

Q. State what conversation, if any, you had with the chief cook regarding the dumping of these ashes on that day of the accident, or any other day before that. A. Well, on the day of the accident we got finished with supper, sitting down, and the chief cook ordered me to dump the ashes. He wasn't much of a pleasant fellow, and I told him—I asked him to give me a hand. He says, "Take the ashes out and dump them." And I couldn't refuse.

Mr. LANDIS. If your honor please, I move that that be stricken out.

The COURT. Yes. Now, Mr. Lustgarten, you must confine your answers to statements of what was said to you and what you said to the person you were talking with and to a description of what you saw or what you did or what happened. It is not your function to theorize or speculate as to beliefs and purposes or anything else. Give this jury the facts as they happened; what was said and what was done.

Q. Now, Mr. Lustgarten, what did he say to you and what did you say to him about dumping these ashes on the night that you got hurt? A. We had a little argument in the galley about dumping the ashes. He told me if I didn't dump the ashes he was going to call the captain down, report me to the captain, and I took the ashes out and dumped them because I didn't want to be confined.

Mr. LANDIS. If your honor please——

60 The COURT. That is an illustration. Why you did it has not been asked for. You have been asked to state the conversation. Strike out after the word "Because."

Q. Is that all that was said? A. That is all.

Q. And you went ahead and dumped them yourself? A. I did.

Q. Had you ever had assistance in dumping the ashes on this boat on prior occasions?

Mr. LANDIS. If your honor please——

A. No, sir.

Mr. LANDIS. All right, I will withdraw that.

Q. What were the weather conditions at the time this conversation with the chief cook took place? A. It was very heavy weather.

Q. Did you notice whether any seas were coming aboard or had come aboard on that deck on that day? A. I did.

Q. What had you noticed? A. I noticed the seas coming over starboard——

Mr. LANDIS. If your honor please, I object to the materiality of this, whatever seas may have come over there before.

The COURT. Objection sustained.

Q. Did you say anything or have any conversation with the chief cook about the weather conditions at that time? A. I told him——

Q. Yes or no? A. Yes, sir.

Q. Your answers should be yes or no. A. Yes, sir.

61 Q. What conversation did you have? A. Well, he told me to dump the ashes and I asked him to give me a hand. He refused.

Q. I asked you this question; I will repeat it: Did you have any conversation with the chief cook about the weather conditions? A. Yes, sir.

Q. Prevailing at the time of the accident? A. Yes, sir.

Mr. LANDIS. I am going to object to that as leading, if your honor please.

The COURT. It is very leading.

Mr. AXTELL. Well, I don't know.

The COURT. You may have exhausted his unrefreshed recollection, but it does not appear. What else was said; tell us all that you can remember now about this conversation. Is there anything that you haven't told us?

The WITNESS. Well, just—well, the chief cook told me to dump the ashes, and I asked him for his assistance; he refused to give me it and told me to dump it myself, and I took the bucket out, as I was ordered, and dumped the ashes over the side.

By the COURT:

Q. Now, have you told us everything you can remember about that conversation? A. Except that the chief cook had an argument with me.

Q. This talk about the captain. Is there anything else that you have not told us? A. Just the argument I had with the master—I mean with the chief cook.

Q. What was that? A. About the dumping of the ashes.

62 Q. What was said? A. Well, he ordered me to dump the ashes, and I asked him for his assistance and he refused.

Q. Is there anything else that was said by you or by him? A. No, sir.

By Mr. AXTELL:

Q. Then what happened to you? Go ahead and tell how you dumped the ashes and what happened. A. I dragged the bucket over—I dragged the bucket out of the galley door to the port side of the ship, and I had to put my foot out to the side of the ship because it was about 14 inches away.

Mr. LANDIS. If your honor please, we think that this man should give us what happened, and I would much prefer that he confine himself to stating what he did, not why he did it.

The COURT. I will let that stand.

Q. Will you take this photograph marked "Plaintiff's Exhibit 5"——

Mr. LANDIS. May I have an exception?

Q. And can you illustrate with the use of that photograph what you did and how you did it? Yes or no; can you? A. I can.

Q. All right. If you will hold the picture up so the jury can see it——

The COURT. No; step down and show it to them.

A. (Witness does as requested.) They had a rail about as high as this [indicating].

63 Q. [Indicating to his breast.] A. Right here [indicating] and the side of the ship was about that far up.

Q. [Indicating about 15 inches.] You mean inside of the rail? A. And had a rail about that low [indicating].

Q. Had another rail about that low [indicating about 14 inches above the deck or floor]? A. (Continued.) And I had to put my foot in through the side and there was another piece of steel coming up from the scupper.

Q. Can you show us on this picture or either of them? Perhaps you can by Exhibit 3. A. Yes, sir.

Q. That is the scupper which you mean [indicating]? A. Yes.

Q. What did you put your foot through? A. The top here.

Q. Over that rail also? A. Right here.

Q. The toprail shown on Exhibit 3; you put your foot over that; is that right? A. Yes, sir.

Q. Then what did you do with the can?

The COURT. That was Exhibit 1 you were referring to?

Mr. AXTELL. It has been marked twice.

The COURT. Oh; very well.

A. And the can was sitting down here and I dragged—put my foot through there [indicating] and I lifted the bucket up until the bucket set about a foot and a half, and I just reached about to my knees, and just as I got the bucket a very heavy—there was a very heavy spray and the ship logged right over, just like—seemed as if she was wallowing right over, and I was leaning up against the rail, and just then the bucket rolled right over me.

64 Q. What was the spray? You mean the water hit you? A. Yes, that was it; a fairly heavy spray.

Q. What happened to you then? A. Well, then, I was knocked unconscious. I don't know what happened.

Q. Do you know whether you were injured any at that time or not? A. Well, my head was mashed and my chest.

Q. What hurt your chest, do you know that? A. Well, the bucket was lying right down on me.

Q. I don't quite understand how the bucket came down on you. A. Well, it was on the rail.

Q. The bucket was on the rail? A. On the top rail and just dumping over, the edge of it over the side. Just then this went right in my face and that is the last thing I remember.

Q. Where did you come to? A. In the hospital.

Q. What was your condition when you came to? A. I was—I couldn't open my mouth. It just seemed to be burning up. I had pains under the chest.

Q. A lit'le louder. A. I had a pain under the chest and on the chest.

Q. Indicating the lower part of your chest and the top of your stomach, I should think? A. Right here [indicating].

Q. Your diaphra'm or somewhere around there? A. I just had a headache and I can hardly see anything.

Q. Can you take your glasses off for a few minutes? What do you wear those for anyway? A. (Witness does as requested.) They prevent headaches and sun bothering me.

Q. They do not help your sight any? A. Oh, yes.

Q. I mean they are not to see with, are they? A. They help some.

65 Q. Well, they are dark glasses, aren't they? A. You can see. They make your eyes rest.

Q. Do you remember whether you were wet by this spray, as you call it?

Mr. LANDIS. If your honor please, I object to this. It is leading.

The COURT. He may answer that. Do not lead him.

Mr. LANDIS. Note my exception.

Q. Will you describe the condition of your clothes? A. Well, I had my under pants on and they were still damp when I came to.

Q. What time was it when you came to, do you know? A. It was on Mr. Abbott's watch, the second officer.

Q. What is that? A. The 8 to 12 watch.

Q. The 8 to 12 watch. Do you know how long before 12 it was or how long after 8, or was it before 8?. A. You mean the time of the accident?

Q. No, the time that you came to? A. No, I don't know what time it was.

Q. Mr. Abbott was there, was he?. A. Yes, he was there.

Q. Was he supposed to be on the bridge? A. I don't know.

Q. Was he on the 8 to 12 watch? A. He was on the 8 to 12 watch.

Q. Well, if he was on the 8 to 12 watch he would be on the bridge between 8 and 12, wouldn't he? A. He used to come down to see me while he was on watch.

Q. He couldn't leave the bridge while he was on watch; you don't mean that, do you? A. No.

Q. Anyway, you saw Abbott; is that right? A. What is that?

66 Q. You saw Abbott there? A. Yes, sir, I seen Abbott.

Q. What did he do for you? A. Well, he took some vaseline or something of the sort and rubbed it on my face and back, and asked me how I felt, and washed my face for me and gave me a good dose of Epsom salt, and that is all they had. That is all they give me.

Q. Did you notice anything else? Did you notice anything else about yourself besides that at the time? A. No, sir, I was in too much pain to be thinking——

Q. Where did you have the most pain? A. The most pain was in the head.

Q. What part of your head hurt? A. Well, it was this side that was swelled [indicating] and over here.

Q. You are indicating first, "as this side," up over your right eye, I should judge? A. It was swollen up here.

Q. And then you indicate the other side about the left side of your jaw? A. Right up here and right down here.

Q. Well, go ahead and tell what they did for you and what you did on the ship from then on. A. Describe the day after the accident?

Q. Right along, just tell the narrative, the story of what occurred on the vessel from this time that you regained consciousness until you left the ship? A. I was laying in the hospital early in the morning. Mr. Abbott came down to see if he could do anything for me. That was the second time he had been down that day, and after that I went—I must have fell asleep and I woke up. I could hardly breathe, so either somebody called the second mate
67 again or somehow he was there, and he had the port holes open and I couldn't catch my breath, and Abbott closed the port holes and dampened by tongue and helped me out and doctored he up a bit, and I fell asleep again until the 2 o'clock—it must have been earlier than that; about 11 o'clock the next day, the captain came in and there was another man laying in the hospital.

Q. Now, a little louder. A. There was another man laying in the hospital and the captain told him to go to work, that he was shorthanded, he needed a mess boy. And so this man couldn't do it, couldn't get out of his bunk, so the captain—I had the lower bunk near the door; the captain came up to me and he says, "I want you to turn to." And I looked at him, I thought he was kidding with me. So then he leaned down and grabbed me by the back of the neck and sat me up in the bunk, told me to get dressed and turn to in the mess room. I told him I couldn't do it, that I was sick. He says, "A few bruises won't hurt you," he says.

Q. What? A. He said, "A few bruises won't hurt you."

Q. He said, "A few bruises won't hurt you"? A. Yes.

Q. Did he say anything else or did you say anything to him? A. Then I started—somebody stole my shirts.

Mr. LANDIS. If your honor please, I object to that.

The COURT. Strike it out.

Q. Tell what you said or what he said. Did you say anything to him about your condition or how you felt? Did you have any conversation about that? A. I made a conversation and he told me to get dressed and my clothes wasn't there.

68 Q. Your what? A. My clothes.

Q. Were not there? A. Were not there.

Q. Yes. A. So he went and got my stuff.

Q. He what? A. He got some clothes for me.

Q. Yes? A. Got dressed, and he give me my clothes, made me get dressed and he took me out of the door and told me to go to work. He took me in the galley first.

Q. How do you mean he took you out? A. He had me under the arms here [indicating].

Q. Indicating the left arm near the shoulder? A. He took me into the door of the galley and the chief cook and himself were talking and he says, "Well," he says, "I will put him in the mess room and let him do the work there, light work there," he says; "when he gets finished there in the afternoon he can help you in the galley."

So I took the stuff from the galley to the mess room and set everything on the table and that was the first time that I got the hemorrhage.

Q. What happened then? A. Then the chief cook had set a batch of bread in the morning, he told me just at the time to mold it and put it in the pans. Well, I just bent my head under the bucket—entered the wooden bin you make your bread in and came right up, I just coughed a whole big clot of blood right up in the bread.

Q. Who was there at the time? A. There was quite a few around the galley at the time.

Q. Had you ever had anything like that before that time? A. Never had anything like that.

Q. Never in your life? A. Never.

Q. Had you ever been in the hospital for tuberculosis? A. No, sir.

Q. For sickness of the lungs or anything of the kind? A. No, sir.

69 Q. Or trouble with your head? Had you had any trouble of that sort before that before? A. No, sir.

Q. Go ahead and tell what happened then. Did you continue working there after that? A. No, sir, the chief cook must have told the captain.

Mr. LANDIS. If your honor please, I move that be stricken out.

Mr. AXTELL. I consent.

The COURT. Strike it out.

Q. Just tell what happened. A. They dumped the bread overboard and I went back to the hospital and nobody ordered me to turn to that day again.

Q. Were you ordered to turn to any day after that? A. No, sir; not after that.

Q. Go ahead and tell what happened the rest of the trip? A. The rest of the trip, I was just walking around with a terrible pain. The very next night I didn't sleep and I think for three nights I didn't sleep. I used to sit up, lay down and walk around. I couldn't fall asleep; in terrible pain.

Q. Where did you have pains? A. In my head and chest, always had a nauseous feeling like I was going to vomit, and I couldn't eat, felt faint.

Q. On this occasion when the captain took you by the arm and marched you into the galley, did he have any—did he look you over, examine you and ask you questions as to what was the matter with you first? A. He never even asked me one question, except that after the dinner was served I think Mr. Abbott thought he better—after I got into the mess room Mr. Abbott came down and he said, "You better come up and see the captain." He says, "You better be
70 in bed." That was after the captain had taken me into the mess room. And I went up to the bridge with him and the captain was on the bridge then, and he says, "Mr. Abbott, I ordered that man to go to work, and that is all." Mr. Abbott took me down and from then I continued as I told you before.

Q. The captain said that. Do you know whether you had a medicine chest made up on this ship or not? A. In the cook's room——

Mr. LANDIS. If your honor please I object to this. It is immaterial and has nothing to do with this case.

The COURT. Objection sustained.

Q. How big a man is the captain? A. Six foot easy; he was about six foot.

The COURT. What has that got to do with it?

Q. Now, tell what happened on the voyage after that. Go ahead with the story. How long did it take you to get into port? A. I think it was on the 11th or 12th day we arrived in Azore Islands.

Q. How many days' sail is that ordinarily?

Mr. LANDIS. If your honor please, I object to this question as not pertinent and not material, in view of the fact that it is admitted by the defendants here anyway that they were past the Azores; that they did not make a trip direct to the Azores but that they were on their way to New York but turned around and came back.

The COURT. He may answer.

Mr. LANDIS. May I have an exception, your honor, please?

The COURT. Yes.

71 Q. How long is that trip to the Azores ordinarily, do you know? A. Well, from Swansea down it is about five days—six days for a ten-knot ship.

Q. You got in there how many days after leaving Swansea? A. On the 11th or 12th day.

Q. What happened to you there, if anything? A. Well, Abbott—well, anyway I was called up to the bridge, the second mate went with me; they had two doctors up there and the captain says—they were Portugese doctors and I didn't understand what they were talking about, but they had an interpreter, or the captain had an interpreter. He walked out of the room while the doctors were examining me and one of the doctors says, "We better take him ashore to the hospital." Which I heard the interpreter say. And

the captain asked me—asked the doctor—asked the interpreter if he could—if I could stay on the ship without any danger until we arrived in New York. The doctor says "No." The interpreter said "No." So he says, "Well," he says, "We will take him ashore and make sure." Says "We will have an X ray taken." Went ashore in a launch and went up to the hospital, had X rays taken. The doctor in the hospital, the American consulate doctors, they looked over the X-ray, told me they better pay me off.

Q. Did you go to the consulate there? A. Yes, sir.

Q. Did you go to the consulate before or after the doctors came aboard? A. After.

Q. Were you paid off there? A. I was.

Q. And left ashore there? A. Yes, sir.

Q. How did you get back to the United States? A. The American consulate helped me.

Q. On what ship? A. French passenger boat.

72 Q. Did you receive any treatment on that ship? A. Yes.

Q. From whom? A. The doctor.

Q. The doctor on the ship? A. Yes, he give me—I had a passenger card.

Q. What? A. A passenger sick card.

Q. What ship was it? A. Sinai.

Mr. AXTELL. I offer it in evidence. I can't read what ship it is.

Mr. LANDIS. If your honor please, I do not see what this proves.

Mr. AXTELL. It is not admissible if you object to it.

Mr. LANDIS. I object to it.

Mr. AXTELL. I ask that it be marked for identification.

The COURT. He said he was assisted by the American consulate to get passage aboard a French passenger boat. What more do you want?

Q. You were treated by a doctor on the way here? A. Yes, sir.

Q. Did you go to a hospital here? A. Yes, sir.

Q. What hospital? A. Marine hospital.

Q. Where at? A. Staten Island.

Q. Stapleton, Staten Island? A. Yes, sir.

Q. How long were you in there? A. 27 or 28 days, I think.

Q. What is that? A. I was 27 or 28 days. I dont exactly remember the number of days.

Q. What did they do for you there? A. Practically nothing.

Q. Have you been in any other hospital since then? A. I have been under a doctor's care in Philadelphia.

73 Q. What doctor? A. Dr. Rubin.

Q. Dr. Rubin? A. Yes.

Q. Where is he? In Philadelphia, you say? A. Philadelphia.

Q. Speak louder so we can hear you. A. Philadelphia. Dr. Rubin.

Q. Do you have relatives living in Philadelphia? A. I have a sister.

Q. Were you staying with her? A. Yes, sir.

Q. Have you lived in Brooklyn since then? A. Yes, sir.
Q. With whom? A. My cousin.
Q. Have you been in any other hospitals here? A. Kings County Hospital.
Q. How long were you in there? A. Day and a half.
Q. How did you happen to go to that hospital? A. Fell unconscious on the street; the police took me there.
Q. When was that? A. I don't know how long ago it was.
Q. What is that? A. I don't know. I think it was two or three months ago.
Q. Have you been to any other hospital than that. A. No, sir, the Well's Eye Hospital.
Q. Were you in the Eye and Ear Post-Graduate Hospital for a day or so? A. Yes, sir.
Q. In order to give the doctors a chance to look at you? A. Yes, sir.
Q. That was how long ago? A. About two and a half months ago.
Q. Have you been examined by Dr. Powers who is sitting here [indicating]? A. Yes, sir.
Q. Did he make X-rays of you at various times? A. He made X-rays.
Q. Yes or no, that is all? A. Yes, sir.
74 Q. Have you had any other injury since this one on the ship? A. No, sir.
Q. Did you have any other injury before this accident which you have described, to your lungs, or to your head? A. Only I stepped on a nail once on a Shipping Board ship.
Q. That did not hurt your head or your lungs? A. No, sir; infection.
Q. Aside from that injury to your foot from a nail have you had any other injury? A. No, sir.
Q. Have you been in any hospital at any time in your life before? If you have, say so? A. Yes, sir, I was in a hospital at Atlantic City.
Q. What for? A. Broken arm.
Q. When? A. When I was about eight years old.
Q. Now, that is twice. Any other hospital experiences besides those two? A. No, sir.
Q. What was your last ship before the "Coelleda"? A. It was either the "Westpool" or the "West Monahan."
Q. "Westpool" or "West Monahan"? A. Yes.
Q. How much time was there between the two ships? A. A week.
Q. Before that what other ships had you been in? A. "West Monahan."
Q. Before that what ship? A. "West Durphee."
Q. The "West Durphee." Before that what ship? A. "Gulf Star."
Q. Before that? A. "Eastern Gale."

Q. "Eastern Gale." What other ship before that? A. I couldn't mention all the ships I have been on.

Q. Mention them if you can. We want to give them an opportunity to look up you record and see what your condition of health was on these vessels.

The COURT. Let us move along.

75 A. Well, you can look on the discharges and see what ships [handing documents to counsel].

Q. You can refresh your recollection by looking at them. These are your discharges? A. Yes, sir. Not all of them.

Mr. AXTELL. Any objection to these going into evidence?

Mr. LANDIS. What is the use of their being introduced into evidence and cluttering up the record if they have no application to the case?

The COURT. You may mark them for identification.

Mr. AXTELL. I ask to have them marked for identification. Counsel can let them go in if he wants.

[Marked "Plaintiff's Exhibit 8" for identification.]

Q. These discharges are records of your services on these ships, are they? A. They are, yes, sir.

Q. Issued to you by the shipping commissioner? A. Yes, sir.

Q. And show the date of entry and the date of leaving? A. Yes, sir.

Q. How much did you weight when you joined this ship, do you know? A. Between 145 and 150.

Q. What means of knowing your weight have you? A. The trip before that, just before I sailed on the "Coelleda," I lost my lifeboat ticket and I went up for a lifeboat ticket again.

Q. Is that a ticket you have to have to ship as an able seaman? A. It is.

Q. Were you examined physically at the time? A. Yes, sir.

76 Q. Were you weighed? A. No, I wasn't weighed I don't think.

Q. Well, I asked you if you had any knowledge of your weight. Do you know what you weighed from any source? A. Between 145 and 150.

Q. When did you weigh yourself before this trip? A. As soon as I came home from the "Westpool."

Q. What do you weigh now? A. 126 pounds.

Q. How do you know that? A. I weighed myself.

Q. When? A. Dr. Carhart's office.

Q. That was how long ago? A. Last week.

Q. Last week. A. Two weeks ago.

Q. How much did you weigh when you got back to the United States? A. I don't know.

Q. How much did you weigh when you entered the United States Marine Hospital at Stapleton, Staten Island, do you know that? A. No.

Q. Do you know whether they weighed you at that time? A. They did but I——

Q. They would have a record of it there? A. Yes.

Mr. AXTELL. Your witness.

Cross-examination by Mr. LANDIS:

Q. Mr. Lustgarten, let us get at the time of this accident a little more definitely, please. When did the ship sail from Swansea; on what day, do you remember? A. I don't remember the date.

Q. Was it March 2nd? A. I couldn't tell you the exact date; I don't know. I didn't have nothing to refresh my memory by as to the date.

Q. You made affidavits, I believe——

77 Mr. AXTELL. Will you pardon me, Mr. Landis? I want to ask for leave to ask one or two questions which I do not want to come in after your cross-examination.

Mr. LANDIS. Yes.

Direct examination (continued) by Mr. AXTELL:

Q. Have you had hemorrhages at all since that time on the ship? A. Yes, sir.

Q. Will you tell the jury how much and to what extent and when it occurred? A. Practically every day; every day coughing, spitting blood all of a sudden.

Q. I judge that on the first occasion there was quite a quantity of blood came from you? A. Yes; there must have been a couple of glasses.

Q. You have not had anything like that since then? A. No.

Q. But you have some blood come from you? A. Yes, sir.

Q. Do you recall any occasion when such a thing happened at my office, 11 Moore Street? A. Since I have been in your office?

Q. Do you recall that one particular occasion? A. Yes, sir.

Q. When was that, do you remember? A. When I arrived at first.

Q. Did you come to my office directly from the ship you came in on? A. No, sir.

Q. How long after you came here did you come to my office? A. I was roaming around on the subway; I didn't know New York, and one of the men from the ship "Coelleda," she had just arrived, took me up.

Q. He brought you over? A. And put me to bed, first.

78 Q. There is one other thing I forgot about this. How about your eyesight? Do you claim you have more trouble with your eyesight now? A. Yes.

Q. What is the matter with your eyes now? A. At times I can't see anything, just on my right eye would be blurred all the time. Blurred.

Q. When did you first notice that? A. On the day the master of the ship went ashore with me.

Q. Where was that, Azores Islands? A. Azores Islands.

Q. You didn't notice any trouble with your eyes until several days after the accident; is that it? A. No.

Q. Had you tried to read anything before that? A. I tried to read?

Q. Yes. A. Before that?

Q. Well, from the time of the accident up to the time you went ashore at the Azores? A. Yes; I tried to read.

Q. Could you read? A. I read a piece of paper there that one of the men was showing me.

Q. You had no trouble with your eyes then? A. I don't remember whether I understood what was in it or not. I looked at it, I know.

Q. Well, we want to find out if you really had any trouble with your eyes before that time or not, when you first noticed any trouble with your eyes? A. I was when I arrives in Azores Islands.

Q. Was that the first time it had occurred to you that something was the matter with your eyes? A. Well, my head was hurting, and the skin was swollen over my eyes; I thought it was because the skin was laying over my eyes.

Q. The flesh was swollen over your eyes? A. Yes, sir.

79 Q. Did that interfere with your vision then? A. Yes.

Q. Which eye? Are both eyes blind now? A. No; my right eye is much worse than my left eye.

Q. You can see quite well with your left eye? A. With my left eye I can see quite well.

Q. Did you have any trouble with your eyes before the accident? A. No.

Q. Did you ever have to wear glasses before the accident? A. No, sir.

Q. Were you ever treated by an oculist for your eyes at all? A. No, sir.

Q. You have never had any trouble with them at all? A. No, sir.

Q. Have you been treated since then for your eyes? A. Yes, sir.

Q. By whom? A. By Wells Eye Hospital.

Q. Where is that? A. Philadelphia.

Q. How long were you in there? A. Dr. Parker. I used to go there every day. You mean what he did?

Q. What did he do for you over there? A. Well, they took and put patches on, with hot water as hot as I could stand them two or three times a day, and put them over my eyes; as hot as I could stand them. Boric acid was in this hot water.

Q. How much can you see with your left eye now? That is the better one, is it not? A. My left eye.

Q. Well, you can see enough to see these pictures and point out things, can't you? A. Yes, I can do that, but the card [indicating] tells you how much, what percentage.

Q. Can you read this contract [handing to witness]?

80 Begin at the top, those big letters [indicating]. A. I can read those top letters; these letters here [indicating].

Q. What does it say? A. "United States Shipping Board, United States Shipping Board Emergency Fleet Corporation."

Q. Can you read the rest of them? A. "Agency agreement; managing and operating vessels." The rest of it I can't. I can see it but I can't read it.

Q. Put it closer to your eyes; do it any way. A. I can't, because it blurs it.

Q. You can make that out a little bit, can't you? A. Yes.

Q. But it is not so easy to read as the other? A. No.

Mr. AXTELL. All right, your witness. I thank you. I quite forgot that phase of it.

Cross-examination (continued) by Mr. LANDIS:

Q. Do you remember definitely how many days after you left Swansea this accident occurred? A. On the second or third day; second or third day.

Q. Try to recall what happened.

The COURT. You will have to speak louder. That gentleman over there [indicating] is the man who is going to decide your case; he has got to hear you.

The WITNESS. The second or third day.

Q. Now, try to remember what you did the first day. It was not the first day, was it? A. No.

Q. Can you recall what you did the first day? A. No. I can not recall.

Q. But you are sure it was not the first day? A. I am positive it was not the first day.

81 Q. What makes you think it was not the first day? A. Because it was—we were outside of the Irish Sea.

Q. Was it the second day? A. No.

Q. It was not the second day; are you sure of that? A. No.

Q. Then it was the third day? A. Third day.

Q. You are sure of that? A. I wouldn't swear it was the third day.

Q. You have sworn to it once here, but I would like to get this date definitely stated. You say here in your bill of particulars, which I take it is sworn to by you, leastwise your name is on it here, that the accident occurred—oh, no. You have it here on the fifth or sixth of March, 1926. That is the third or fourth day out, for the ship left Swansea on March 2nd. If the ship left Swansea on March 2nd, this accident occurred March 5th, is that it? A. That is, the third day after the ship left Swansea; yes.

Q. And it occurred between six and seven o'clock at night? A. Yes; between six and seven.

Q. What time does the crew have supper while the ship is on the high seas? A. I just can't hear your question.

Q. What time does the crew have supper when the ship is on the high seas? A. At five, and then the man is relieved at the wheel at five-thirty.

Q. What? A. The man is relieved at the wheel at five-thirty.

Q. The man is relieved at the wheel at five-thirty? A. Yes, sir; and he eats his supper.

Q. Do your duties as second cook require you to wash dishes and that sort of thing? A. No, sir.

Q. The mess boy does that? A. Yes, sir.

82 Q. How many weeks had you been second cook at the time of this accident, do you remember? A. Four weeks—no, three weeks.

Q. About three weeks. During this time how many times had you dumped ashes? A. In the three weeks we were there I dumped them every day, practically.

Q. Every day? A. Except skipping one day or so once in a while, I guess.

Q. What time of day did you usually dump these ashes? A. Right after supper.

Q. Always after supper? A. Always after supper.

Q. What sort of a range was in this galley? Can you describe it, the size of it? A. The range was about ten feet long, about three feet deep, big double fires; big, heavy galvanized—a big iron stove, double fires.

Q. It burned double fires? A. Double fires.

Q. What sort of coal is burned in this range? A. We had this small pea coal.

Q. Small pea coal? A. Yes.

Q. That is a hard coal, is it not? A. Well, a sort of hard coal. I don't know much about it.

Q. Where was this coal kept? A. On the shelter deck.

Q. Wasn't some of it kept in the galley? A. Yes.

Q. What? A. I remember now. There is a chute comes right from the galley down to—there is a big bin made for the coal in the galley.

Q. And it comes from the shelter deck, is that it? A. It comes from the boat deck. They must have loaded the coal—I don't remember where the coal came from. I never loaded it on the ship.

Q. Was all the coal on board the ship to be used in the galley, in the galley, do you know? A. Yes.

Q. It was all there? A. Yes.

83 Q. Do you know how much coal that was? A. We had enough coal to complete the trip, five weeks.

Q. Would you estimate it at 100 ton or 1 ton? A. I would estimate it about 10 tons was in that bin.

Q. How large a room was this galley? A. How large a room?

Q. Yes. A. It is——

Q. How long is it? A. It is about 25 feet long and about 15 feet deep.

Q. Of course, I do not suppose you know the size in cubic feet of a ton of coal, do you? A. Yes, at the beginning of the trip.

Q. No. How many cubic feet are in a ton of coal; do you know that? A. No.

Q. You are just making a wild guess when you say there were 10 tons of coal in there? A. I am not making a wild guess because the chief cook told me himself.

Q. Just a minute. It does not matter what the chief cook told you because that would not make it any the less a guess on your part, would it? You do not know how much coal was in there? A. I do. Not at the time of——

Q. How do you know? A. It was this way: I was going into the coal bunkers to get enough coal for the galley, to shove it toward the entrance where you could shovel it.

Q. In what coal bunkers are these? A. In the galley.

Q. They are all in the galley? A. Yes.

Q. Did you measure the coal at that time? A. No, the chief cook told me we had——

Q. No, it does not matter what the chief cook told you. Did you measure the coal? A. No, sir.

84 Q. You do not know how much coal was there? If I were to tell you that there was a ton there, that was probably the fact, was it not? A. If you told me a half ton at the time it was, that was right.

Q. There was just about a half ton of coal there at the time that the accident happened? A. Yes.

Q. Was there ten ton of coal on there when you left Swansea? A. Ten ton of coal from the time we left Baltimore.

Q. Oh, at the time you left Baltimore. I see. And a half a ton when you left Swansea? A. No, this was on the second day out when we had time to go into the galley—into the bunkers and do that.

Q. But how much coal was there at the time you left Swansea, do you suppose? A. Well, about a half a foot from the deck.

Q. You would estimate it a half a ton at the time that the accident occurred? A. I couldn't tell you exactly.

Q. You had not used much, had you, between the time that you left Swansea and the time that this accident occurred? A. No.

Q. Who sifted the ashes down; did you do that? A. From where?

Q. From the place where the coal burned down to the grate, through the grate down into the ash can below? A. I did.

Q. You did that. When had you done that last, previous to the time that the accident occurred? A. About the day before we left Swansea.

Q. You had not sifted the ashes since the day before you left Swansea? A. No.

Q. That is, you had not shaken them out of the place where you had the fire to the ash bin in the stove below, is that the case? A. I shook it out but I did not empty the fires. I kept them burning all night.

85 Q. Oh, yes; but you took the ashes out of the range from time to time, did you? A. Yes.

Q. In fact, you dumped those about once a day, you testified a little while ago? A. Yes, sir.

Q. When did you take the ashes out of the stove the last time prior to the accident? A. When I took them out of the stove?

Q. Yes. When did you take what ashes were left in the stove out of the stove just prior to the accident? A. I guess it was the day before.

Q. That is, you had dumped them the day before? A. Yes.

Q. Are these ashes placed in the ash can from time to time during the day, or are they always taken from the stove and placed in the ash can immediately before they are dumped? A. That ash can is also a slop bucket.

Q. Well, that does not answer my question. A. They are always shaken out after supper.

Q. They are only placed in the ash can immediately after supper? A. Yes.

Q. And you do that? A. Yes.

Q. What do you use to do it with? A. Shovel.

Q. What sort of a shovel is that? A. A small sized shovel made to fit the bunker.

Q. It is an ordinary, small range ash shovel? A. Yes, sir.

Q. That is, the range is about the same range as in the home except it is a little larger? A. It is an ordinary stove attached to the bulkhead.

Q. It is a little larger than the ordinary range in the home? A. Much larger.

Q. It only burns two fires? A. Two fires.

Q. How many shovels full of ashes did you have to take out of that range immediately prior to the accident? A. How many shovels full?

Q. Yes. A. Well, about——

86 Q. Half a dozen? A. No, took about 15 out of each side.

Q. Fifteen small shovels full out of each side? A. Yes.

Q. How large a shovel is this? You spoke of it as a small ordinary range shovel, did you not? I suppose that each of those shovels full of ashes weighed about half a pound, do they not? A. About six or seven pounds, maybe eight pounds, nine pounds.

Q. Do you mean to try to make this jury believe that an ordinary ash shovel, such a shovel as is used to take ashes out of ranges, such a shovel full of ashes weighs six or seven pounds of ashes in the shovel? A. It was no ordinary ash shovel.

Q. You just testified it was. A. It was a specially made one.

Q. Now, you are changing your testimony, Mr. Lustgarten. You realize, of course, that I was getting at the point that 250 pounds of ashes were impossible under these circumstances; is that not the case? Do you know how many tons or pounds of coal would have to be used (of course you do not) to result in a couple of hundred pounds of ashes? A. I do.

Q. How many pounds of coal would you suppose? A. How many pounds?

Q. Yes. A. About 100 pounds to make——

Q. You mean that the refuse of 100 pounds of coal would weigh more than the coal itself? A. These were ashes, they were wet down from the top.

Q. Who wetted them down when they were wet? A. I wetted them down.

Q. When did you do that? A. Just prior to taking them out.

Q. I am talking about the weight of the shovel full. A. I
87 told you it was a cut-off shovel with an ordinary handle, like a large hand shovel; had to have a specially made handle to reach all the way back into the oven.

Q. How wide a shovel was that, six inches? A. Seven inches, six or seven inches.

Q. Six or seven inches and how long, ten inches? A. About ten or twelve inches.

Q. Now, then, a shovel of that sort full of ashes would weigh seven pounds, is that what you want the jury to understand? A. Seven or eight pounds.

Q. And you took thirty such shovels full out of that stove? A. Yes.

Q. Now, make a mathematical calculation and figure out how much those ashes would weigh that you took out of there? Can you do that? A. No, sir.

Q. There were thirty shovels full, so you figure out now all told; three sevens are twenty-one, that would be 210 pounds of ashes. Of course, a pound of ashes comes from more than a pound of coal, does it not? A. Yes.

Q. You admit that it is reasonable—

Mr. AXTELL. I do not understand this. I refrained from objecting to all this testimony, going into the question of the plaintiff's knowledge of the science, and all that sort of thing; it seems to be quite immaterial and irrelevant. I object to it further——

The COURT. Objection overruled.

Q. And you had a half a ton of coal in there at the time that the accident occurred, is that the case? A. You mean in the bunker?

Q. For the use in the galley range; you testified to that, didn't you? A. In the bunker.

88 Q. That is all the coal there was there to be used for the range, isn't that so? A. That it all the coal for the range in the galley, yes.

Q. Did you take any more coal on at—well, you do not know. You were not there in Punta Delgardo when the ship sailed on.

Q. Don't you want to reconsider your testimony at this time and revise your testimony concerning how many pounds of ashes you dumped over the side of the ship? A. No, sir.

Q. Well, state again; tell the jury how many pounds of ashes there were. A. Well, I can only tell you, if I would have weighed the ashes when I dumped them out——

Q. Give us your estimate, your best guess. A. Well, my estimate was approximately 200 and maybe more, just about according to what the ash bucket holds.

Q. You testified, did you not, yesterday in this case before another judge and jury, Mr. Lustgarten? A. Yes, sir.

Q. Do you recollect what you testified the weight of the ashes you dumped was yesterday? A. No, sir; I do not.

Q. You don't recollect stating that the weight of the ashes was approximately 100 or 150 pounds? A. No, sir.

Q. You don't recollect that? A. I must have said it.

Q. You did say it. And you are swearing to this bill of particulars? A. I don't know what it is.

Q. Well, is this your signature [indicating]? A. Yes, sir.

Q. That is your signature? A. Yes, sir.

Q. You did swear to this, did you not? A. Yes, I must have; that is my signature.

Q. Can you read this? A. No, sir.

89 Q. Or is it too fine for you? A. Too fine.

Q. You can't read it.

Mr. LANDIS. You will concede that he said 250 pounds of ashes in your bill of particulars?

Mr. AXTELL. Yes.

Q. At the time you swore to this bill of particulars the amount of the ashes that you dumped was 250 pounds. Was that the case? This bill of particulars was sworn to by you on March 31st. Yesterday you reduced that to 100 to 150 pounds. Now, which is correct? A. Well, it was either between 150 and 200 pounds, may be more.

Q. And every time you dumped these ashes, each day you dumped them, the ashes weighed that much, did they not? A. Not every time I dumped them, no.

Q. How often? Was this the general rule that they weighed 200, 250 pounds? A. No; sometimes only weighed 50 pounds.

Q. Well, I suppose those were the days that you didn't cook on board the ship; is that it? A. Yes.

Q. How do you account for the variation? A. The slop was at the bottom of the ashes, made it lighter; so it was three-quarters full of garbage and a quarter full of ashes.

Q. I see. There wasn't any slop or garbage at this time, it was all ashes? A. Yes.

Q. How did you happen to wet those ashes down? A. They were still hot.

Q. So you put water on them to cool them off? A. Yes, sir.

Q. Describe this can again, will you; the ash can that you used? A. It was between two and three feet high.

90 Q. You said this morning two and a half to three feet. Now, which is correct; was it two feet or three feet or what was it? A. I didn't measure the bucket, but I just showed you where it reached on my body.

Q. Explain it and demonstrate to the jury where it reached on your body. A. To here [indicating].

Q. How tall are you? A. I guess I am about five foot seven.

Q. That is about three feet, is that it? A. Yes, I guess so.

Q. How big in diameter was it? A. A foot and a half.

Q. Are you sure it was a foot and a half in diameter? A. It was about this big around [indicating].

Q. That is more than a foot and a half around. Do you understand what I mean when I say "diameter"? A. You mean right across.

Q. Yes. As you demonstrated it there it is more than a foot and a half. A. It is?

Q. Demonstrate it again so the jury can see it. A. About this big around [indicating].

Q. That is a couple of feet.

Mr. AXTELL. No, it is not.

Mr. LANDIS. A foot and a half?

Mr. AXTELL. A foot and a half.

By the COURT:

Q. Could you get both arms around it? A. Yes, sir.

By Mr. LANDIS:

Q. Now, was this ash pail which you have just described full of ashes at the time you dumped it? A. Overflowing.

91 Q. It was overflowing. Did you spill any of them on the way over to the side of the vessel? A. I spilled plenty of them.

Q. You spilled a lot of them. You have testified, have you not, that there were not any other buckets of any sort in the galley or on the ship that you could use in dumping these ashes? A. There wasn't no bucket, small buckets in the galley there.

Q. There were buckets on the ship that you could have had, weren't there? A. Those buckets are used for the men to wash with.

Q. Well, there are other buckets besides those that the men wash with; how about those that you used to scrub up the decks with? A. The galley deck?

Q. Any decks. You have buckets on this ship, haven't you? A. We had buckets, the boatswain had them.

Q. You saw buckets when you were in A. B. there? A. Yes.

Q. Did you ever ask anybody to let you have buckets? A. I asked the chief cook.

Q. Why did you ask the chief cook? A. The big ash can was too heavy to empty at one time.

Q. I don't mean that. Who is in charge of the mess room of a ship? A. The steward.

Q. Why didn't you ask the steward? A. Deserted.

Q. There wasn't any steward on the ship? A. No, sir.

Q. What officer was in charge? There was an officer in charge, wasn't there? A. The chief cook was in charge of the galley and the stores.

Q. Wasn't the third officer placed in charge of the galley of that ship? A. No, sir.

92 Q. How about your friend Mr. Abbott, wasn't he in charge of it? A. No, sir, the captain took the food out.

Q. What? A. I say, the captain took the food out of the storeroom and put it in the locker amidships.

Q. Well, never mind that.

Mr. LANDIS. I move to strike that out. I don't think that has anything to do with the case.

The COURT. Strike it out.

Q. Now, let us get exactly what happened in that galley prior to the time that you started to dump these ashes. You took these ashes of course out of the stove and placed them in this ash can? A. Yes, sir.

Q. Did you do that of your own accord? A. The chief cook's orders.

Q. I see. Did the chief cook order you to do it every night? A. Whenever he wanted to dump them, he would order me to do it.

Q. I thought you said you did it generally at night. A. Yes, sir.

Q. He ordered you each time you did it? You did not do that in the natural course of your duties? A. During the day——

Q. You knew you were supposed to dump ashes; that was a part of your job, wasn't it? A. Well, I had never been second cook before.

Q. Didn't you tell the captain of this vessel that you were a second cook when you made application for that job? Didn't you tell Mr. O'Connor you were a second cook when you made application for that job? A. I think I did make application as second cook.

93 Q. Didn't you shown the captain a discharge as a second cook? A. You will find the discharge in that book. It is true.

Q. You showed him your discharge. I am asking you to answer yes or no. Didn't you show the captain a discharge as second cook? A. Yes, sir.

Q. Then you have been a second cook and you knew the duties of a second cook? A. I knew my duties.

Q. You had been working three weeks as a second cook, hadn't you? A. Yes; I had been working three weeks.

Q. Let alone the job you had had before as second cook? A. I had the same kind of a job coming in on the "Westpool."

Q. It doesn't matter; you had a second cook's job before or you would not have had a discharge as second cook. You knew you were supposed to dump ashes as a part of your regular duties as second cook? A. Yes, sir.

Q. And you mean to say that the chief cook told you every time you had to dump ashes? A. He did.

Q. And that you didn't do it in the ordinary course of your duties? A. No, sir.

Q. Did he order you to make every move you made? A. No, sir.

Q. You did your job as you should do it in any ship, of course, as a good second cook, didn't you? A. He wrote down what stuff he wanted me to do and then if he wanted something extra done, why, he would ask me.

Q. Did he order you to dump ashes the first time that you assumed the duty of second cook? A. Yes.

Q. Did he order you to dump the ashes the second time? A. Yes.

Q. Did he order you to dump the ashes the third time? A. Yes.

94 Q. Did he order you to dump the ashes the fourth day? A. Yes.

Q. Did he order you to dump the ashes the fifth day? A. Yes.

Q. Did he order you to dump the ashes the sixth day? A. Yes.

Q. And every day? A. Yes.

Q. You never undertook voluntarily to dump the ashes without his order? A. I was under his order, and whatever he told me to do I did.

By the COURT:

Q. You didn't do anything else except what he told you? A. Not only—as a matter of fact, in taking care of the stove, he wouldn't let anybody touch his stove; he wouldn't let anybody—unless he wanted them to touch it. He wouldn't let anybody interfere with the heat when he was cooking.

By Mr. LANDIS:

Q. That hasn't anything to do with dumping ashes. You know very well, Mr. Lustgarten, that you did not await his orders to dump ashes; you did it as a matter of course, as part of pour regular duties, you took those ashes and dumped them over the side of the ship, didn't you? A. At his orders; yes, sir.

Q. And he ordered you every time that you dumped ashes, to dump ashes, and you never dumped them unless he ordered you to dump them, is that what you want the jury to believe? A. Yes, sir.

Q. Why did you do that? Why didn't you voluntarily dump ashes as any ordinary second cook would? A. Because he told me to absolutely leave his stove alone.

95 Q. But this particular ash can; was that a part of his stove? A. No.

Q. Were you on board that ship while the steward was on board her? A. No, sir.

Q. You were not on board? A. I was on board the ship.

Q. But you were not second cook at that time? A. No, sir.

By the COURT:

Q. When did you put these ashes in this can before you dumped them on the day of the accident? A. What time?

Q. When. A. Between six and seven, after supper.

Q. So the entire accumulation of ashes which you attempted to dump over the side was placed by you personally in the can after your orders from the cook? A. Yes, sir.

By Mr. LANDIS:

Q. Have you ever spoken to any officer about this one ash can you had in the vessel and ask to have something else, so that you might have an easier job to dump ashes? A. No, sir.

Q. Why didn't you do that? A. I asked the cook.

Q. Well, why didn't you ask an officer? The cook is not an officer on board that ship, is he? A. He was my boss.

Q. He is not an officer on board that ship, is he? A. I was under his orders.

By the COURT:

Q. How heavy was this can when it was empty? A. When it was empty?

96 Q. Yes. A. It was about 15 or 20 pounds.

Q. You had no difficulty with it then, did you? A. No, sir.

By Mr. LANDIS:

Q. You could have talked to an officer; there wasn't any law against your going up——

The COURT. I do not think it is necessary to go further into that.

Mr. LANDIS. Sir?

The COURT. I do not think it is necessary to go further into that.

Mr. LANDIS. I want to get it established, if your honor please, that there were pails on board that ship and he could have had them if he had made any request.

The COURT: Come up to the desk.

(Counsel and court confer.)

By Mr. LANDIS:

Q. Well, now, did you testify that when you got out to the place where the accident occurred—what did you first do after you got out there? A. Out of the hospital?

Q. No; after you got out where the accident occurred with the can of ashes that you were about to dump? A. You mean the way I dumped the ashes?

Q. Yes. What did you do first, what was your first—you got the ash can up alongside of the rail, now what did you do? A. I tilted it over the second rail.

Q. Did you first put your foot through the rail? A. First put my foot through the rail.

Q. Do you know how high that rail is? A. I do.

97 Q. How high? A. About that high [indicating].

Q. No, the rail you put your foot through? A. What did you say?

Q. The rail you put your foot through, how high is that? A. That is about that high [indicating].

Q. That high from the deck where you were standing? A. Yes, sir.

Q. And there was a rail just about 21 inches above it, wasn't there? A. Yes.

Q. When you got your foot through there you were sort of leaning backward, weren't you? A. Leaning right up against the rail.

Q. Now, then in that position you lifted this ash can weighing 200 pounds up to the top rail of the vessel, is that the case? A. I tilted it up.

Q. How did you tilt it up? A. I swung it forward on the side and I slid it up on the bulkhead.

Q. What bulkhead? A. The bulkhead.

Q. You mean alongside of the house there? A. Yes, sir.

Q. How could you slide up alongside of the house? A. Can I describe it to you here?

Q. Yes. A. Put my foot through here [indicating], and I tilted the bucket over this way, and put my foot—

Q. You could not have leaned that way, could you? This thing here [indicating] is quite aways away from where you were standing, isn't it? A. This way [indicating].

Q. That is not quite the position? A. That is the position [indicating].

Q. You got braced on this side of the vessel, is that it? A. With my foot down through here and I pulled the bucket over, just reached it over that way, and bent over, and I took it and just slide it over and lift it right up.

98 Q. You lifted this 250 pounds how high, four feet? A. That high [indicating].

Q. Three and a half feet? A. I just remember the part of my body that touched it.

Q. All right. Get back on the stand. Now, what sort of water hit you? You testified today that it was a spray. Is that what it was? A. Heavy spray.

Q. You testified yesterday you didn't know what it was, whether it was spray or whether it was a wave? A. I said spray.

Q. Do you remember verifying the complaint in this action? A. I do.

Q. Is this a copy of the complaint which you verified? A. It must be.

Mr. LANDIS. You will concede that it is, won't you, Mr. Axtell? This is the copy of the complaint that he verified?

Mr. AXTELL. Yes.

Q. You remember stating in here that a heavy green sea suddenly came forward aboard the ship. Do you mean there that it was

merely a spray, or did you mean a heavy green sea? A. A heavy green sea.

Q. A heavy green sea that came over? A. We call that a sea.

Q. Mr. Flynn, whose testimony has been take in your behalf, has testified, has he not—but you have not seen his deposition? A. I have not seen his deposition, no.

Q. Well, I will withdraw that question. Now, what sort of spray was this? A. Very heavy spray.

Q. What do you mean by "heavy spray"? A. Heavy spray, I couldn't describe it to you.

Q. Was it solid water? A. Not solid water, no.

99 Q. It was like the top of a wave when it strikes the side of the ship? A. Yes.

Q. Where did that wave come from, do you know? Did it come running alongside of the vessel or did it come straight over? A. Well, it took me by surprise, and I don't know whether it come over the side of the ship or whether it came from the offshore side in.

Q. Do you know whether anybody saw this accident? A. There was a whole—there was quite a few around the galley because I had to make a run of it to get across the deck.

Q. Did Mr. Dubrusky see this accident? A. I presume he did.

Q. Did Mr. Flynn see it? A. I guess he did.

Q. Did any of the officers see it? A. I don't think so; I don't know.

Q. Didn't you tell the consul out in the Azores that Mr. Abbott had seen it? A. I don't remember saying that.

Q. You remember making an affidavit out there, do you not? A. Yes, sir; I made one.

Q. Is that your signature [indicating]? A. It must be.

Q. You are able to see that, aren't you? A. Yes, sir.

Mr. LANDIS. You will concede that here it states——

Mr. AXTELL. Why don't you offer it in evidence?

Mr. LANDIS. I don't want it in evidence yet.

Mr. AXTELL. Well, I will object to it if you do not put it in evidence?

Mr. LANDIS. He has already admitted his signature, if your honor please.

100 The COURT. That is enough.

Mr. AXTELL. Put it in evidence; put the whole thing in.

Mr. LANDIS. I will in due course, but I do not want it now. However, I will pass that for the moment.

Mr. AXTELL. I ask that it be marked for identification.

The COURT. It may be marked for identification.

Mr. AXTELL. I offer it in evidence.

Mr. LANDIS. Why, if your honor please——

The COURT. It may be marked for identification. You may have it marked in evidence at another time.

(Marked "Plaintiff's Exhibit 9 for Identification.")

Q. Do you remember how many people you passed on the way from the galley to the ship's side? Were any between the galley and the ship's side; did you have to pass any of them? A. No.

Q. You did not have to pass anybody? A. No.

Q. You had a clear passageway? A. Yes.

Q. Now, speak up a little louder, Mr. Lustgarten. A. I had a clear passageway.

Q. You don't recollect from what direction that water came that struck you? A. I couldn't tell.

Q. Did it strike you at all before it struck the pail? A. I couldn't tell you.

Q. You don't remember whether it struck you or struck the pail first? A. I don't remember.

Q. But you remember the pail striking you? A. I could feel it; yes.

Q. Where did the pail strike you? A. First on the head.

101 Q. Where was your head in relation to that pail prior to the time the water hit it; was it back of it or was it just alongside of it. A. Just alongside of it.

Q. Now, I take it that the back end of the pail hit your head, is that true? A. I don't know whether it was the back or whether it was the front. I know the pail hit my head.

Q. Did you receive any scars or anything from this pail hitting you on the head? A. Yes, sir.

Q. How long did you carry those scars? A. Until I got back to New York.

Q. You lost them when you got back here, or after you got back here? A. I still carry them.

Q. No; that is no scar. If it is a scar, was there anything more than that that you carried, or how long did you carry it? Was there any gash, for instance? A. You mean the skin broken?

Q. Yes. A. No, not that I remember of.

Q. It did not break at all? A. No.

Q. Were you burned? A. Yes.

Q. What burned you? A. My back. I don't know what burned me. I presume it was the ashes.

Q. You had wet those ashes down before you started to dump them, had you not? A. Yes, sir.

Q. How had those ashes remained hot when you had wetted them before you took them out to dump them? A. I don't know why they remained hot.

Q. What happened, did you receive blisters from these burns? A. Yes.

Q. How long did you carry those blisters? A. I don't know how long I carried those blisters.

Q. They were there while you were on the ship? A. While I was on the ship; yes, sir.

Q. Were you able to lay on your back? A They were broke the very next morning.

102 Q. You were able to lay on your back comfortably? A. I wasn't comfortable. I don't know as——

By the COURT:

Q. Were you able to lie on your back? A. I don't know whether I was lying on my back or my side.

Q. Don't you know whether you were able to lie on your back? A. No, sir; I don't think I was.

Q. Don't you know?

By Mr. LANDIS:

Q. As a matter of fact, Mr. Lustgarten, you didn't have any blisters on your back at all, did you? A. I did.

Q. That is not the fact, is it? You were not burned? A. I did.

Q. Those ashes were not hot; they had been wetted and they could not have been hot. The water came up over them anyway and would have wetted the ashes if you had not wetted them before, isn't that true? You were not burned? A. These ashes would steam anyway, I guess.

By the COURT:

Q. Your underclothing that you had on was still wet, was that burned? A. Judge, I don't know what became of my clothes.

Q. You said when you came to in the hospital you had wet underclothing on. Was that burned? A. It was not underclothing, it was pants.

Q. Just the pants? A. Yes, sir.

Q. Is that all you had on? A. That is all.

103 By Mr. LANDIS:

Q. Probably your clothes were all burned up. Is that probably the case? A. (No answer.)

Q. Did you ever get your clothes back? A. I never got back my clothes. That is why I say that somebody took them.

Q. Who was there when you returned to consciousness; who was in the hospital? A. Mr. Abbott.

Q. Is that all? A. I don't remember if there was anybody else in there.

Q. Who is Mr. Abbott? A. The second officer.

Q. Did you ever have any conversation with any of the other officers other than Mr. Abbott concerning this accident? A. Except the master of the ship.

Q. Have you ever had any conversation with Mr. O'Connor? A. No.

Q. Possibly you just don't remember talking to Mr. O'Connor? A. No; I had no conversation with Mr. O'Connor.

Q. Did you ever have any conversation with Mr. Cox, the third officer? A. No, sir.

Q. The only man you really had any conversation with or anything to do with you was Mr. Abbott? A. Yes, sir.

Q. What did Mr. Abbott do for you when you returned to consciousness? A. Well, I told you he put some vaseline or something of that sort on me, and gave me a dose of Epsom salts.

Q. Then he put you in bed and left you there? A. I was already in bed.

Q. What? A. I was already in bed.

Q. But he left you in bed and went on his way? A. Yes, sir.

104 Q. When did you first see the captain after the accident; how many days afterwards? A. I don't know how many days it was.

Q. You have testified on direct examination it was the third day afterwards, didn't you? A. I think it was the very next day.

Q. The very next day? A. Yes, sir.

Q. Was anybody present when you had this conversation with the captain? A. Yes, sir.

Q. Who was present? A. There was another man in the hospital.

Q. Do you know his name? A. Yes, he was Thomason.

Q. Were any of the officers there? A. When I returned to consciousness?

Q. No, when you had that conversation with the captain. A. No, sir.

Q. There were not? A. No, sir.

Q. What took place when you and Mr. Abbott went up on the bridge of the vessel and talked to the captain on the birdge? A. What do you mean; what conversation took place?

Q. Yes, what conversation took place? A. Mr. Abbott told the captain I was sick.

Q. And the captain then took you off duty, didn't he? A. That night; yes, sir.

Q. How many days did you work all told after the alleged accident? A. Oh, for about—in the mess room about two hours.

Q. Only two hours all told? A. That is all.

Q. Was this the only time that you, Mr. Abbott, and the captain were together that time on the bridge? A. Yes, sir.

Q. Have you given the whole conversation that took place at that time between you? A. Yes, I remember the captain saying when he told him I was coughing up blood, spitting blood, he said, well, "I guess he has got tuberculosis."

105 Q. There wasn't anything else that was said by the captain in your presence and in the presence of Mr. Abbott? A. No, sir.

Mr. LANDIS. Now, then, I am ready to offer this in evidence——

Mr. AXTELL. No objection.

The COURT. What is the purpose of that?

Mr. LANDIS. Admission against interest, to show this man up as having made statements under oath which are contradictory of the statements he is making at this time on the stand.

The COURT. It may go in.

(Marked "Defendant's Exhibit A.")

The COURT. If it is offered for the purpose of contradiction of the witness, he is entitled to be confronted with it.

Mr. LANDIS. He can not read it.

The COURT. If it is offered for an admission it may be received, if there is no objection.

Mr. LANDIS. Well, I have not offered it as an admission but the admission is in the nature of a contradiction of what he is saying now.

The COURT. Then he is entitled to be confronted with it.

Mr. LANDIS. Then I will read it to him. This letter [indicating] is a letter from the consul to us.

Mr. AXTELL. The affidavit is in evidence; do you want to question him on it?

Mr. LANDIS. Yes.

Mr. AXTELL. Go ahead.

106 Q. Then there was no such conversation between Mr. Abbott and the captain of this vessel in your presence as is stated in this affidavit, which reads as follows:

"The captain"——

Mr. AXTELL. I suggest that counsel read the whole affidavit. It is in evidence.

The COURT. He need not do so. Objection overruled.

Mr. LANDIS. "The captain kept on saying, 'Give him another dose of salts,' and Mr. Abbott, the second officer, said, 'Captain, you will kill him if you give him more Epsom salts.' The captain says 'That is what I want to do.'"

Q. That was not said, was it? A. You refresh my memory on it now.

Q. When was that said? A. On the day that he took me up to the bridge.

Q. How did he happen to say that? A. How did he happen——

Q. Yes. A. He didn't have no use for the whole crew.

Q. Well, that does not matter. How did he happen to say that? What was the conversation leading up to it? A. I couldn't tell distinctly every word he said.

Q. You have done pretty well so far, Mr. Lustgarten. Now just keep on with this. A. I couldn't tell you just word for word unless I was reminded.

Q. That took place on the bridge, did it? A. On the bridge, yes, sir.

Q. Did you ever see the captain any place else but on the bridge? A. After the accident?

Q. Yes. A. When I was in the hospital.

Q. You saw him in the hospital? A. Yes, sir.

107 Q. Are those the only two times you saw the captain, the time when you saw him in the hospital when he told you to go to work, and the time he relieved you from duty? A. And I seen him passing by to go back aft once.

Q. You saw him passing by? A. Yes.

Q. Did you have any conversation with him at that time? A. No, I did not.

Q. When did you have your first attack of blood flowing out of your nose and mouth, the day that you were put to work? A. Yes.

Q. How many attacks did you have on that day? A. Two or three attacks that day.

Q. You did not have any more than two or three attacks that day? A. I don't remember them.

Q. This affidavit said you had five attacks. Did you have that many? A. Did I swear to that?

Q. You swore to it? A. I guess I did.

Q. You didn't remember much more about it than you do now? You didn't remember better then than you do now how many attacks you had? A. Yes, I do. The American consul asked me to go to the hospital physician.

Q. How many attacks did you have this day that you were made to work? That has nothing to do with Punta Delgardo. How many attacks have you had within the last week? A. This last week?

Q. Yes. A. Coughing up blood?

Q. Yes. A. Every day.

Q. What time of day does it usually happen? A. You mean coughing? Well, I coughed blood a few minutes ago, just prior to coming in here.

Q. Standing in the hall? A. No; after I had dinner.

Q. Are you able to run up the stairs, Mr. Lustgarten, without glasses, for instance? A. To run up——

108 Q. Yes. A. No, sir.

Q. Have you ever done that? A. After the accident?

Q. No; have you done it within the last few weeks, the last month or two? A. Run?

Q. Can you do it? A. You mean run or just run up the stairs?

Q. Yes; run up the stairs. A. I don't think so.

Q. You can't do it? A. I don't think so.

Q. You know whether you can. Have you done it. A. I have not done it.

Q. You haven't done it at your cousin's house in Brooklyn? A. No, sir.

Q. You didn't do it after you received a special delivery letter, run up in your underclothes without your glasses? A. Where was that?

Q. At your cousin's house in Brooklyn about a month and a half ago? A. No.

Q. Are you able to get off the street cars and get across the street in pretty good shape? A. Yes, sir.

Q. Can you do that? A. Yes.

Q. And you can see pictures easy enough, can't you? A. Yes, sir.

Q. Have you ever had any treatment in the New York Eye and Ear Hospital? A. Yes, sir.

Q. How long were you treated there? A. Well, I don't remember the dates.

Q. You were only treated for a day or two; you went in for an examination? A. Three or four times.

Q. What? A. I guess I went in three or four times.

Q. You were an out-patient? A. Patient from the Staten Island Hospital.

Q. Were you ever in the Brooklyn Eye and Ear Hospital? A. Yes; Mr. Axtell took me over there.

109 Q. How long ago were you over there? A. I don't know; I don't remember.

Q. Have you ever been treated by any other eye doctor either on your own account or that Mr. Axtell has sent you to? A. I have seen so many doctors I can't remember the names.

A JUROR. A little louder.

The COURT. That did not call for names. The question was whether you have ever been to any other eye doctor.

The WITNESS. Yes, to the eye doctor that you sent out.

Q. I am speaking on your own account or that Mr. Axtell sent you to? A. To the Wells Eye Hospital.

Q. In Philadelphia? A. Dr. Carhart from New York.

Q. Dr. Carhart. Is he an eye specialist? A. Yes.

Q. Anybody else? A. Dr. Powers.

Q. Is Dr. Powers an eye specialist? A. Yes, sir.

Q. Anybody else? A. I don't think so.

Q. Now how many hospitals have you been in in which your chest has been examined and samples of your sputum taken? A. Oh—

Q. Can you say? You have been in the Post-Graduate, it was done there? A. Yes, sir.

Q. You were in Kings County, it was done there? A. Yes, sir.

Q. Have you ever been in any other hospitals that you know of where they took your sputum or made an examination of your chest? A. Staten Island Hospital.

Q. Any others? A. No.

110 Q. Have you ever been to any doctors on your own account, or at Mr. Axtell's suggestion, for an examination of your lungs, or your chest where your sputum has been taken or X rays have been made of your chest? A. Dr. Powers.

Q. Did Dr. Powers take an X ray of your chest? A. Yes.

Q. He is the only one? A. Yes.

Q. That is, except the doctors which I have—— A. There has been another X-ray laboratory. I went up to that place you sent me to.

Q. Yes; but nobody that Mr. Axtell has sent you to, or you have had on your own account, except Dr. Powers that you remember? A. Dr. Powers and another place.

Q. Up in the Times Building? A. I think so.

Q. Those are the only two? A. Yes.

Q. And they were both X rays. Did either of those places take samples of your sputum? A. Dr. Powers took samples of my sputum.

Q. Anybody else? A. No.

Q. How many samples did Dr. Powers take of your sputum? A. One sample.

Q. Just one sample. When was this? He has made various examinations of you, hasn't he? A. Five or six times.

Q. When was this sputum taken? A. I don't remember.

Q. Was it recently? A. Recently, about a month ago.

Q. About a month ago. He never took any before that? A. No, sir.

Q. When were these X rays taken by Dr. Powers; recently? A. Some were taken last month, some were taken—no, this—yes, last month. Some were taken last year.

Q. What was this X ray of, your chest? A. X ray of the chest.

111 Q. Was an X ray of the chest? A. Yes.

Q. In both cases? A. He X rayed the whole part of me; he X rayed my head.

Q. He X rayed you head last year, didn't he? A. Yes.

Q. And this year he has X rayed your chest? A. Yes, chest.

Q. Those are all the X rays you remember being made by Dr. Powers? A. Had one taken in Azores Islands, too.

Q. Yes. Did you ever ask the captain to go to a hospital, the captain of the "Coelleda" to go to a hospital? A. Yes.

Q. Did he let you go to the hospital? A. No, he said "No."

Q. He did not let you go to the hospital in the Azores Islands? A. To see if I should go to the hospital.

Q. What? A. Wanted to see if I should go to the hospital.

Q. Well, he permitted you to be paid off in the Azores so you might have medical treatment there, didn't he? A. Yes.

Q. You admit that. Mr. Abbott gave you the medical treatment on board the ship, did he not? A. Yes.

Q. No complaint in that direction, was there? A. (No answer.)

Q. The only complaint you have about the treatment you received after the alleged accident happened was that the captain made you work for a period of a couple of hours, is that true? A. Yes, sir.

Q. Did you ever sail in the "President Harrison"? A. No, sir.

Q. Did you ever sail on any Grace Line ships? A. No, sir.

112 Q. Have you ever sailed in the Atlantic Ocean prior to your voyage on the "Coelleda"? A. Yes, sir.

Q. You have been around in the Pacific, have you not? A. Yes, sir.

Q. Between what years were you around in the Pacific? A. 1922 and 1923.

Q. Those two years? A. And 1924.

Q. 1924? A. I don't know that positive.

Q. Did you say that you had sailed on any Grace Line ships during that period? A. Grace Line.

Q. Out of New York or around the coast? A. Grace Line?

Q. Yes, W. R. Grace. A. No, sir.

By the COURT:

Q. Answer whether you have ever sailed on a Grace Line ship? A. No, sir.

By Mr. LANDIS:

Q. Now, isn't it true, Mr. Lustgarten, that you told Mr. O'Connor that you wanted to be made second cook because you had had an accident a year before which had impaired your health and made the work of an A. B. rather difficult; isn't that true? A. I never told Mr. O'Connor anything of the kind.

Q. You did have such an accident, did you not? A. I never had any accident prior to this one that I can recall just now.

Q. Well, you qualify it? A. I never told Mr. O'Connor anything of the kind.

Q. You never told Mr. Abbott that either? A. I never told Mr. Abbott that either.

113 Q. Did you ever have any illness on board any ship that you had sailed on prior to the "Coelleda"? A. No, sir, I haven't been sick on any ship.

Q. When did you first go to sea? A. The late part of 1922.

Q. How old were you then? A. I guess I was about fourteen.

Q. What did you sail as on that voyage? A. I sailed as—I was a work-a-way on the "Jacob Luckenbach."

Q. That sailed to the Pacific, did it not? A. Pacific coast, yes.

Q. Had you ever run away from home before that? A. No, sir.

Q. Didn't you run away from home when you were twelve years of age? A. No, sir.

Q. Your sister was mistaken about your running away from home at twelve years of age? A. No, sir. When I was twelve years of age—when I was twelve years of age I was in Atlantic City in school.

Q. What grade did you reach in school? A. I was in the seventh grade at the time.

Q. Did you ever claim to have taken a course in a pharmaceutical college in Philadelphia? A. Intentions.

Q. You claimed to have really been there? A. I claimed.

Q. You admit asking for the second cook's job, don't you? A. No, I don't.

Q. Wouldn't it be better to have a job paying $80 a month than a job paying $62.50? A. Yes, it would.

Q. Or $65, whatever it may have been. You wanted to get it of course? A. I didn't ask for the job.

Q. The captain is lying? A. No, the chief cook went in and told the captain that I had a second cook's discharge.

114 Q. The captain says you asked him for the job. A. I never done anything of the kind.

Q. Did you ask to be placed back doing deck work after you were relieved from the cook's job because of your illness? A. No.

Q. Didn't you ask Mr. O'Connor to let you do deck work? A. When I was ill?

Q. After you were relieved from the cook's job, because you had been spitting blood, or the captain thought may be you had? A. I asked O'Connor to go to work on deck?

Q. You did that, didn't you? A. Not that I recall.

Q. The first hospital you entered here was the Marine Hospital over in Staten Island, was that not true? A. Yes, sir.

Q. You asked for your discharge over in the Marine Hospital at Staten Island, did you not? You asked to be discharged from there, did you not? A. From Staten Island Hospital?

Q. Yes. A. I asked to be discharged?

Q. You asked for your discharge from this Marine Hospital in Staten Island? A. The nurse came up and told me at Staten Island.

Q. Answer my question. Did you or did you not? A. I never asked for no discharge from Staten Island.

Q. If the records show it the records are mistaken, is that true? A. The doctor was sick at the time I was discharged.

Q. Do you know what the doctor's name was? A. No, I don't remember his name.

Q. Was it Dr. MacPeck? A. Dr. MacPeck.

Q. He was ill at the time of your discharge? A. Ill at the time of my discharge.

Q. The records are lying when they show that you asked for your discharge?

115 Mr. AXTELL. I object on the ground that the records do not talk.

The COURT. That is not a proper question. Objection sustained. You can not ask the witness to characterize documents that are not in evidence.

Mr. LANDIS. I will withdraw the question.

Q. Did you tell whoever took your history at the Marine Hospital that you were struck by a heavy sea? A. I believe so.

Q. Then you were not struck by spray after all, you were struck by a heavy sea? A. I will tell you, from the time of the accident until the present time, when I was really ill, there have been so many people asking me questions that I can't remember who they all were or just how——

Q. You remember better now what occurred on that particular day than at any other time, is that true? A. I remember better now.

Q. You were not struck by a heavy sea, although you may have said so at that time, which was about a month and a half after the accident occurred? A. I guess so.

Q. Do you remember swearing in the complaint that you were knocked against the rail? A. Yes.

Q. How did you happen to do that? You have not testified that you were knocked against the rail; you testified that you do not

know what happened to you after this bucket came up against your head? A. I was against the rail at the time.

Q. How did you happen to swear to that fact? A. The bucket went down on me, jammed my chest and head right up against the rail.

Q. The bucket was over your head, is that it? A. Yes, it was over my head.

116 Q. I thought your head was alongside of the bucket? A. Over here [indicating].

Q. I thought your head was alongside of the bucket? A. Well, when I—it seems as if I must have bent my head a little bit looking down and then it went over.

By the COURT:

Q. You did not have it on your head, did you? A. No, sir.

Q. You had it in front of you? A. Right on the side of me.

Q. As you lifted it to put it over the rail it was between you and the rail, was it not? A. It was half over the rail, half over the side of the ship and half over me.

Q. Then how could it hit you in the back? A. The water just threw it up.

Q. You mean the water hit you or the bucket hit you? A. The bucket hit me.

Q. In the back? A. Just hit me on the side of the head and rolled right off my back.

Q. Did you fall down? A. Yes, sir.

Q. Did you fall down with it in your arms? A. No! I didn't have it in my arms.

Q. How did it come that you stated in your complaint the sea struck you on the back and rolled your chest with great force against the rail of the vessel? A. The bucket was coming up, was lying right on my head and back. That is why I surmised it, because——

Q. That is your only explanation? A. The only explanation I have.

117 By Mr. LANDIS:

Q. You testified a little differently yesterday, did you not, Mr. Lustgarten? A. I don't know.

Q. What rail did your chest strike, if you remember; the top rail? A. Top rail, I guess.

Q. Yesterday you testified it was the bottom rail that your chest struck, did you not? A. I did not.

Q. This is your testimony, is it not? A. That is my testimony.

Mr. LANDIS. Now, may I read this, your honor?

The COURT. Yes.

Q. You testified to this, did you not, yesterday:

"Q. How heavy was it? A. Approximately 150 pounds.

"Q. Speak up. A. It was approximately between 100 and 150 pounds.

"Q. Between 100 and 150? A. Yes, sir.

"Q. That is with ashes in it? A. Yes, sir, with the ashes.
"Q. Who put those ashes in there? A. I put them in.
"Q. When this sea struck you what happened to the bucket and you? A. Well, the bucket went down on my head and chest.
"Q. Louder, please; I can not hear you. A. As soon as the bucket dropped it hit practically on my head and chest, bumping my head and chest right against the rail of the vessel.
"Q. And you went on this rail below, is that it? A. Yes, sir.
"Q. Where was the bucket in reference to you? Did it come down on your back? A. Right on my back, yes.
118 "Q. What part of it struck your back? A. I do not know how the bucket struck."
Q. You testified to that yesterday, didn't you? A. I testified——
Q. You testified to what I read, did you not? A. Yes, sir.
Q. Your memory was much clearer yesterday than it is to-day as to how that happened? A. No, it is not. It is just the same.
Q. You testified a little while ago you didn't remember anything after that bucket hit you in the face? A. I don't remember anything.
Q. This time you said the bucket hit you in the back? A. It did.
Q. How could it hit your face? You say you didn't remember anything. It hit you in the back first? A. Well, I could feel the bucket when it came down on me.
Q. When did your father die, Mr. Lustgarten? A. About seven or eight years ago.
Q. Do you remember what year? A. No, I don't.
Q. What was your father's trade? A. Dyer.
Q. He was never a druggist, was he? A. No, sir.
Q. You have said at different times that he was a druggist, have you not? A. A druggist?
Q. Yes. A. I have a brother who is a druggist.
Q. You have told that he was a druggist, and you have told people that your brother was a physician. You have a tendency to lie, haven't you, Mr. Lustgarten?
Mr. AXTELL. What is that?
Mr. LANDIS. I withdraw the question.
Q. You don't remember when your father died. Do you remember what he died of? A. Yes, sir.
Q. What did he die of? A. Heart trouble.
119 Q. He did not die in an automobile accident, did he? A. No.
Q. You have stated that he did die in an automobile accident, haven't you? A. I stated he died in an automobile accident?
Q. Answer my question? A. No; I did not.
Q. You never have. When did your mother die? A. Four or five months before my father.
Q. What was your mother's name? A. Sir?
Q. First name? A. Mary Lustgarten.
Q. Where was she born? A. I don't know.
Mr. AXTELL. I object.

Q. She was born in Austria, wasn't she? A. No.

Mr. AXTELL. I object to that. It is immaterial. How can he know?

Mr. LANDIS. He knows by hearsay.

The COURT. He says he does not know.

Q. Do you know where your mother died? A. Yes.

Mr. LANDIS. That is all.

Redirect examination by Mr. AXTELL:

Q. At the time you were told to dump these ashes by the cook, will you explain just exactly what orders you received, or what conversation you had, and what you did before or after with reference to the ashes in a chronological order; that is, the order of time? A. The time? You mean the time, say, five minutes or ten minutes, something like that?

Q. Well, you finished some of the work on the day——

120 By the COURT:

Q. You had your supper and you had this conversation about the ashes. Now, tell us from the time you were first spoken to about the ashes what was said by you or by anybody else in your presence and what you did. Now, tell it yourself without any interruption. Go ahead and tell this jury. A. You mean about the chief cook ordering me to take the ashes out?

Q. Everything that happened until you got hit. A. I went into the galley; the chief cook was in there eating supper, and I was just about to sit down and eat mine and the chief cook says to take the ashes out and dump them overboard. I asked him to give me a hand into dumping these ashes and he said, "You can dump them yourself," and I started to argue with him, so he says, "Well, if you don't dump them I am going to tell the captain and put you where we got one other one there.

So I didn't want to start any more trouble; I took the ashes and dragged them across the deck, got them as high as the rail——

Q. Now, one moment. Let me interrupt you there. A moment ago you told me very definitely that after you received these orders you, yourself, filled the bucket? A. Yes, I told you that.

Q. Now, put that in if it is true. You are skipping something. A. I filled the bucket.

By Mr. AXTELL:

Q. This witness started in here by saying the ashes were there. When you had this conversation in the galley, where were the ashes, in the stove or in the bucket? A. Part of them was in the stove and part still in the bucket.

121 Q. You had already started to do the work? A. I had already started, and I finished up.

Mr. AXTELL. That is all.

By the COURT:

Q. Whatever ashes were in that bucket you placed there yourself? A. Only the ashes that remained outside of the stove——

Q. Whatever ashes were in that bucket you put in that bucket, is that correct or not? A. Yes, sir.

Mr. LANDIS. I have just one or two more questions.

Recross-examination by Mr. LANDIS:

Q. Did you ask anybody to assist you with that bucket other than the chief cook? A. No, sir.

Q. You never made a request of those who were standing around to assist you? A. No, sir.

Q. Why didn't you do that? A. They wouldn't do it anyway.

Mr. LANDIS. Now I move that that be stricken out. The witness does not know what they would do.

The COURT. I assume he thought so and acted upon it accordingly. It is responsive to the question. You left the door wide open.

Q. The quarrel that you had with the cook at this time was mainly a matter of when those ashes were going to be dumped; you were intending to dump the ashes sooner or later, were you not? A. Yes.

Q. You would have dumped them of your own accord, even
122 though he did not order you to, if you didn't do that at that particular time? A. (No answer.)

Q. You would not have ever dumped those ashes if he had not ordered you to? A. I wouldn't have dumped them. I would have dumped them on his orders; yes.

Q. You would have left them in that galley standing there day after day until he had ordered you to dump them? A. That is something I don't know. I don't know what I would have done. I would have dumped them, though.

Q. Your fight which you had with the cook at that particular time was mainly that you wanted to eat your supper and he wanted you to dump the ashes; that is true; isn't it? A. Yes.

Q. That was the nature of the order he gave you? A. Yes.

Mr. LANDIS. That is all.

Mr. AXTELL. I will read the deposition of Frank Voogd, taken the 16th of November, 1926. This is a deposition taken before the trial of the action of a witness, a member of the crew, before he had gone away [reading]:

Direct examination by Mr. AXTELL:

"Q. Were you a sailor on the SS. 'Coelleda'? A. Yes.

"Q. At the time a man by the name of Lustgarten was employed on her? A. Yes.

"Q. Are you a seaman? A. Yes.

"Q. Do you expect to go to sea again soon? A. Yes.

"Q. Do you know when it was when you were on this vessel? A. It was on a voyage from January to the 5th of April.

123 "Q. January to April, when? A. 1926.
"Q. What was your work? A. A. S.
"Q. What was Lustgarten? A. A. B. or ordinary A. S.
"Q. Do you know anything about the accident?"

Mr. LANDIS. If your honor please, I object to the use of that word "accident" until it is shown this man saw the accident. As a matter of fact, he did not.

The COURT. I think you may skip to the third page. He says he saw him at nighttime.

Mr. AXTELL. Yes; I will do that. [Continuing reading:]

"Q. Did you see him the day of the accident? A. Yes.
"Q. Before or after? A. After.
"Q. Where? A. In his room.
"Q. At what time. A. Nighttime.
"Q. Do you know how long before you saw him he was supposed to have been hurt? A. What? No; I don't.
"Q. What time did you first hear about it? A. Nighttime, he was telling me about it.
"Q. Describe his appearance and general condition when you saw him? A. He was looking pretty pale, and he had hemorrhages, like puking blood.
"Q. You saw blood coming from where? A. His mouth; he was very sick.
"Q. You said hemorrhages didn't you? A. Spitting blood.
"Q. You said puking it. A. Very little that night.
"Q. Had you ever seen any blood coming any time before that? A. No.

124 "Q. Was it on way to United States or England? A. United States.
"Q. From what port had she just sailed? A. Swansea.
"Q. How many days out was she? A. Three days.
"Q. Did you see him again during the voyage, after this time? A. Yes.
"Q. How many times? A. Several times a day.
"Q. Did he complete the voyage? A. Yes.
"Q. On that ship? A. He got paid off in the Azores.
"Q. How many days after the accident? A. Approximately 11 or 12 days.
"Q. How long did it take the ship to go from Swansea to the Azores? A. That was 12 days from Swansea to Azores, it must have been 8 or 9 days.
"Q. Do you know how many days after he did any work? A. Next day.
"Q. What doing? A. In the galley as second cook.
"Q. What was he doing before the accident?"

Mr. AXTELL. We can omit that. We know what he was. I will skip down to the next question.

"Q. Describe his appearance the day after the accident, or the time you saw him after the night you saw him? A. Very pale looking, very sick; he tell me he was awful sick."

Mr. LANDIS. I am going to object to the latter part of that and move that it be stricken out.

Mr. AXTELL. All right; I consent.

The COURT. Strike it out.

125 "Q. You say he was working that day? A. Yes.

"Q. How much work? A. Second cook's work.

"Q. How many days before he worked after day you thought he was hurt? A. I could not say for sure.

"Q. Who was in direct charge of Lustgarten? A. Second officer.

"Q. When he was cook? A. Chief cook.

"Q. Was there any chief steward on this ship? A. No.

"Q. No steward? A. No.

"Q. Duties of steward were performed by chief cook. A. Yes.

"Q. Was he white or colored? A. White.

"Q. Who was captain? A. I don't know.

"Q. What color? White or black?"

Mr. LANDIS. If your honor please, I am objecting to all of this.

Mr. AXTELL. I think we have pleaded that in the bill of particulars; that this man was an incompetent and improper person to put in charge of an American ship with a white crew.

Mr. LANDIS. If your honor please, the only complaint Lustgarten had, which he made on the stand, was that he was made to work two hours by the captain. There was not anything else wrong with the ship, or the conduct of the captain after the accident occurred.

The COURT. I will sustain the objection.

Mr. AXTELL. Exception; for the sake of the record.

The COURT. Now the question on page 7.

Mr. LANDIS. Page 7.

Mr. AXTELL. Skip to that place.

126 "Q. How many were Americans? A. I don't know, the whole crew I think.

"Q. Did you see any bruises or marks on this man's body? A. No.

"Q. Did you see him with his clothes off? A. No.

"Q. Was he laid up as sick on ship, before getting into Azores? A. Yes; after accident.

"Q. How long after accident? A. Several days.

"Q. Then he left ship at Azores? A. Yes.

"Q. Were you at Consullar's with him? A. Yes. I carried his clothes.

"Q. Did you hear any conversation with consulor and Lustgarten?"

Mr. AXTELL. That would not be admissable anyway. I won't read that.

The COURT. There was no conversation.

Mr. AXTELL. I was not even going to read the answer to the question. I did not read far enough ahead.

The COURT. All right.

"Q. How did the boy appear when you saw him last at the Azores?"

Mr. LANDIS. I am going to object to that.

The COURT. Objection sustained. You can read the answer to the last part?

Mr. AXTELL. "He was very lively?"

The COURT. Yes.

Mr. AXTELL (reading):

"Q. Did it ever occur to you that he may have been tubercular?"

Mr. LANDIS. I object to that, if your honor please.

127 The COURT. Objection sustained.

Mr. AXTELL (reading):

"Q. Did you see any chute on ship, such as a canvas chute or other chute used to dump garbage or slops from galley? A. No, sir.

"Q. Have you seen those on other ships? A. Yes.

"Q. What is appliance called? A. Just garbage chute.

"Q. Was there any on this ship? A. No.

"Q. During any time? A. No.

"Q. Are you sure? A. Yes.

"Q. How did they do it? A. They lift can over rail and dump it that way.

"Q. What size was it? A. 25 gallons.

"Q. Ordinary garbage can? A. A little smaller; about so high [witness illustrates 2½ feet].

"Q. Same as we have in city? A. Not as large.

"Q. How many men did it take to do this? A. It was pretty heavy and usually took two.

"Q. It is pretty heavy? A. Yes, and they have to lean over the rail.

"Q. When chute is used have you ever observed what the method of dumping is? A. To keep dirt off.

"Q. I mean means; how do they do it? A. Just lift foot off deck and slip it over.

"Q. Is it possible to use a smaller pail when chute is provided? A. Yes, it is possible.

"Q. Is that all you know about Lustgarten? A. I met him again in New York.

"Q. Did you hear him ask the captain or any officers to be relieved from duty after he was hurt? A. No, sir.

128 "Q. What duties did you see him doing or attempting to do after he was hurt? A. Same duties as before.

"Q. What were they? A. In the galley helping out cook.

"Q. What did that consist of? A. Second cook is supposed to be baking, washing pots and pans.

"Q. He was on duty and you saw him? A. Yes.

"Q. For how long after he was hurt? A. 3 or 4 days.

"Q. More than one day anyway? A. Yes.

"Q. When you left Swansea, Wales, what was the condition of the ship as to her drawing of water? A. Well, she was leaking in the

after peak. I don't know how much she was drawing, but she was leaking.

"Q. Was that discovered before she left? A. Yes.

"Q. How do you know? A. I discovered it.

"Q. Who reported it? A. I reported it to the chief officer.

"Q. What did he do? A. Tried to open steam jet to keep it out; then we rigged up a pump but it didn't keep it out and he let it go.

"Q. Were there any supplies there? A. Yes.

"Q. What became of them? A. They were ruined.

"Q. What were they worth?"

Mr. LANDIS. I am objecting to that.

The COURT. Objection sustained.

Mr. AXTELL. Well, I will omit that. [Continuing reading:]

"Q. What were they used for? A. Heavy gear for jumbo pump.

"Q. Any galley supplies? A. No, sir.

"Q. Where did the leak come in? A. In after peak of well.

129 "Q. In well? A. Yes.

"Q. Where in reference to rudder? A. On top of rudder.

"Q. Over stuffing boxes or hole where rudder goes out? A. You mean the king post?

"Q. Yes, king post? A. No, Hog Island ships are built differently from other ships.

"Q. Do you know whether or not the after peak became filled with water? A. Do you mean the lazarette, or the aft peak?

"Q. The fresh-water tank? A. Space on top.

"Q. Filled with salt water? A. Yes.

"Q. Did you notice whether"——

Mr. LANDIS. I am objecting to that, if your honor please, and move to strike out that answer until it be shown when that after peak was filled with water.

The COURT. Objection overruled.

Mr. LANDIS. If your honor please, it is very important, it seems to me, that if this peak was filled on the 12th of March and this accident happened on the 5th, that it has no pertinency at all.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (reading):

"Q. Did you notice whether it made a difference in the level of the ship? A. Made it harder to steer.

"Q. Were you steering at the time? A. Yes.

"Q. After the water leaking? A. Yes.

"Q. Had you steered her before? A. Yes.

"Q. What difference did you notice? A. It took an awful lot of wheel to keep her in course. It was hard to keep her on course.

130 "Q. How many points would she run off? A. Point and a half.

"Q. How many degrees? A. 60 to 70 degrees"——

Mr. AXTELL. I think that must be a mistake. The stenographer was very poor on this job.

"A. She was not so bad in good weather and only ran off one-half or three-quarters of a point.

"Q. It was bad weather leaving Swansea and it took 12 days' voyage. A. Not ordinarily.

"Q. Ordinarily it took 3 or 4 days? A. Yes.

"Q. Did the water in the aft peak have anything to do with the delay of the ship in making the Azores? A. In my opinion it would, it would make it heavier."

Mr. LANDIS. If your honor please, I object to this. As a matter of fact, the water in the after peak did not have any effect upon this delay and this man has not qualified as an expert.

The COURT. He has not qualified; I will sustain the objection.

Mr. AXTELL. Exception.

"Q. How much experience have you had at sea? A. Since 1915.

"Q. On deck? A. On deck.

"Q. Been going to sea all that time? A. Sail and steam.

"Q. Was there anything wrong with the ship's engines, that you know? A. No.

"Q. Or boilers? A. No; I don't know.

"Q. How many revolutions was she making? A. I don't know.

131 "Q. During rough weather, was she going full speed or half? A. Various speeds.

Q. Did you notice any difference in line of ship after the aft peak tank was filled with water, was it higher or lower? A. Lower.

Q. How much lower?"

Mr. LANDIS. If your honor please, it appears in this case that he never saw the draft of that vessel, and I am going to move to strike out that phase of the testimony.

Mr. AXTELL. All right.

The COURT. All right, strike it out.

Mr. AXTELL (continuing reading):

"Q. Did you notice any difference in the rolling of the ship, or her stability before and after water was discovered in aft peak?"

The COURT. These are all conclusions, aren't they? The next one particularly? He does not know anything about it, does he?

Mr. AXTELL. I will omit the rest of that. We have got plenty of other competent evidence.

"Q. Was she loaded? A. Yes.

"Q. What with? A. Coal.

"Q. What hatches? A. Nos. 1, 2, 4 and 5.

"Q. Was she fully laden? A. Yes.

"Q. How much freeboard did she have? A. Loaded to her marks.

"Q. When water was in aft peak did she dip her stern below mark? A. I don't know.

"Q. Did you have sufficient food——"

132 Mr. LANDIS. If your honor please, I object to that as incompetent, immaterial, and irrelevant.

The COURT. Objection sustained.

Mr. AXTELL. Well, I will omit it.

Then the cross-examination begins.

Cross-examination (read by Mr. LANDIS):

Mr. LANDIS. I want to read from page 14. There is one question I want to read. [Reading:]

"Q. Was any protest made by crew at going to sea with vessel in that leaking condition before she sailed? A. No, sir."

Mr. LANDIS. I do not think there is going to be a great deal of cross-examination that I am going to bother the court and jury with. Just the last page. [Reading:]

"Q. What is your rating now, are you seaman? A. A. S."

(Apparently, able-bodied seaman.)

"Q. You have been going to sea how long? A. Since 1915."

Mr. LANDIS. That is all.

Mr. AXTELL. There is one question on page 16. [Reading:]

"Q. Did you ever see garbage chute rigged on ship at sea in storm? A. Yes, by their staves.

"Q. In a storm? A. Yes.

"Q. What ship? A. Well, I couldn't recall names of ships.

"Q. Weather remained rough nearly all the voyage from Swansea to Azores, didn't it?"

Well, that is the other part.

133 Mr. AXTELL. I will read the deposition of Joseph Bradley Murphy. This was taken on the 6th day of January, 1927. [Reading:]

JOSEPH BRADLEY MURPHY, called as a witness on behalf of the plaintiff, being duly sworn, deposes and testified as follows:

"Direct examination by Mr. AXTELL:

"Q. You were born in the United States? A. Yes.

"Q. Did you know a boy by the name of Lustgarten on this voyage? A. Yes.

"Q. Do you know anything about him getting hurt? A. Yes.

"Q. Did you see the accident? A. No.

"Q. Were you on duty at the time? A. I wasn't on duty. I was in the forecastle.

"Q. How far from the place? A. 100 feet.

"Q. Did you see him afterwards? A. Yes.

"Q. How long? A. 20 minutes.

"Q. Where was he? A. In the forecastle.

"Q. What was his condition? A. Laying down on the deck.

"Q. Describe his condition? A. Laying on the deck and he seemed to have difficulty in breathing because of pain. Second mate came down and helped him in cook's room.

"Q. How long was he kept there? A. One day or two.

"Q. Did you see them requiring him to work after that? A. He worked after that.

"Q. Did you notice his physical condition? A. He seemed to be ailing all the time.

134 "Q. Did he make any complaint? A. Yes, he said his ribs were hurting and his side and back hurt.

"Q. Had you noticed this condition before the accident? A. No.

"Q. Anything unusual before the accident? A. No.

"Q. Any coughing or spitting or anything before the accident? A. No.

"Q. Had you seen him on the ship before the accident? A. Yes.

"Q. How many times? A. 700 or 800.

"Q. He was an ordinary seaman? A. Yes.

"Q. You were in the same department? A. Yes.

"Q. Did you ever work with him? A. Yes.

"Q. Did you notice anything unusual? A. No.

"Q. How did he appear? A. Good health.

"Q. Was he a willing worker or not? A. Yes.

"Q. Absolutely nothing wrong with him at that time? A. No."

Mr. LANDIS. If your honor please, I object to that.

Mr. AXTELL. All right; I consent that it be stricken out.

The COURT. Strike it out.

Mr. AXTELL (continuing reading):

"Describe his appearance? A. Rather youthful and playful; nothing in the matter of his appearance that I could remark on.

"Q. Happy disposition? A. Yes.

"Q. How big was he? A. About 130 or 140 pounds.

"Q. After the accident did he continue to work all the way? A. He got sort of light duty around the galley.

135 "Q. Did they keep him on duty all the time? A. Yes.

"Q. Where did he leave the ship? A. Punta del Garda.

"Q. What was his condition? A. He had to be helped into the boat.

"Q. He continued to work all the way? A. He got sort of light duty around galley.

"Q. But they kept him on duty all the time? A. Yes."

Mr. LANDIS. This is repetition down to here [indicating].

Mr. AXTELL. I will omit it, then. [Continuing reading:]

"Q. Did you ever hear him make any complaint about working? A. No."

Mr. LANDIS. If your honor please—well, go ahead.

Mr. AXTELL (reading):

"Q. Did you hear him make any request to officers or stewards in his department to be relieved? A. No. Anyone he spoke to he said he was ailing.

"Q. Any marks on his body that you saw, any bruises? A. He didn't carry himself right.

"Q. How? A. He didn't swing his arms like an ordinary man.

"Q. Where was he hurt? A. In his side and back.

"Q. Did the ship have what is known as a garbage chute? A. No.

"Q. Do you know what a garbage chute is? A. Yes.

"Q. Do you know whether it is customary for a ship to be equipped with a garbage chute?"

136 Mr. LANDIS. If your honor please, I do not know that this man is qualified to answer this question; it does not show how long he has been going to sea or anything else.

Mr. AXTELL. It does not appear——

The COURT. I will sustain it.

Mr. AXTELL. I won't press it. We have got plenty of other witnesses anyway. [Continuing reading:]

"Q. How was the ship behaving? A. Rolling.

"Q. What was she loaded with? A. Coal and building stone.

"Q. How far? A. Below the Plimsol mark.

"Q. Did she have a Plimsol mark? A. Yes.

"Q. Did you see it? A. Yes; I remarked on it being on the American ship as they seldom had it, but they carried it as a mark of courtesy.

"Q. Was that Plimsol line below water when you left port? A. Yes.

"Q. Where? A. Fore or aft or amidships? A. Fore.

"Q. How much? A. Two feet down.

"Q. How about the stern? A. About the maximum load line.

"Q. Midships? A. A little below.

"Q. How many days out of port was it when the aft peak was full of water? A. Started taking water immediately.

"Q. Did that make any difference? A. It put her stern down more.

"Q. How did the ship steer? A. Steered rotten.

"Q. Had you steered her any before she left Swansea? A. Yes; coming down.

"Q. How did she steer then? A. Rotten; you couldn't keep her within two points of her course.

137 "Q. In bad weather how did she steer? A. Bad.

"Q. How in points? A. You could keep her within two points of her course.

"Q. Her steering engine was not broken? A. No.

"Q. What effect did that have on her taking seas aboard? A. Well, if you couldn't steer"——

Mr. LANDIS. If your honor please, I am going to object to this. That calls for——

The COURT. Objection sustained.

Mr. AXTELL (continuing reading):

"Q. Where were you when this man was working? A. Aft.

"Q. On midships deck? A. Yes.

"Q. Did you see any seas coming up on that deck? A. Yes.

"Q. Did you see any? A. Yes; they would come up and hit the house.

"Q. Who was steering at the time? A. I don't know.

"Q. What time was it? A. About 3 p. m.

"Q. You are not certain? A. No.

"Q. You think it was in the afternoon? A. I think it was; no, it couldn't have been; I wasn't on watch.

"Q. What was your watch? A. 12 to 4.

"Q. You were not on watch at the time of the accident? A. No; it must have been in the afternoon, after 4.

"Q. You are not very certain? A. No.

"Q. What was the effect of her steering off two points as to seas coming aboard midships?"

Mr. LANDIS. I object to this.

The COURT. Same ruling.

Mr. AXTELL. Exception (continuing reading):

138 "Q. Did you observe that yourself? A. Yes.

"Q. On the day of the accident it was a moderate sea? A. Moderate swell.

"Q. Ordinarily would seas come aboard? A. Yes."

Mr. LANDIS. If your honor please, I object to that.

The COURT. Same ruling.

Mr. AXTELL (continuing reading):

"Q. If she was properly loaded and in good steering condition would the seas come aboard?"

Mr. LANDIS. I object to that.

The COURT. Same ruling.

Mr. AXTELL. The question I want is:

"Q. If that ship had steered properly and had not been overloaded, considering the weather condition do you think seas would have come aboard midships?"

Mr. LANDIS. I object to that.

The COURT. Objection sustained as immaterial.

Mr. AXTELL. What is you honor's ruling as to the answer? The same?

The COURT. Yes.

Mr. AXTELL. Exception. That is all; your witness.

Cross-examination (read by Mr. LANDIS):

"Q. After he was hurt, the mate came to him, or one of the mates came to him and carried him somewhere? A. Yes.

"Q. He received no medical treatment? A. No.

"Q. How were the seas? A. Port on.

139 "Q. How much? A. 3 points on the port bow.

"Q. That was your observation? A. Not on that day only, but on the whole trip.

"Q. What side did the accident happen on? A. Port side.

"Q. Did you ever see an ash chute used at sea under those conditions? A. Yes; but on the lee side of the ship instead of the weather side.

"Q. You have seen ash chutes used? A. Yes.

"Q. What ship? A. Every ship.

"Q. How much was it down by the stern and up by the head? A. It was the other way around; she was down about 2 feet by the head.

"Q. Where is this aft peak tank? A. Aft.
"Q. And it got full of water? A. When we got out to sea.
"Q. Did the flooding of the aft peak tank affect the trim of the ship? A. Yes; it brought her about on even keel.
"Q. At the time of the accident she was about on even keel? A. Yes.
"Q. You feel sure? A. Yes.
"Q. Other witnesses have testified she was down by the stern? A. Never was.
"Q. If she was on even keel her steering wasn't affected? A. Yes; loaded too deep to steer ship, and that type of ship never steers well anyway.
"Q. Then do you mean to say that a light ship sails better than a loaded one? A. Yes.
"Q. Under all conditions? A. Not all, but general conditions.
"Q. How much below Plimsol mark would you say? A. Mark was in water.
"Q. How far? A. 6 inches."
Mr. LANDIS. That is all.
Mr. AXTELL. This is the deposition of Vernon Flynn:

140 VERNON FLYNN, called as a witness on behalf of the plaintiff, being duly sworn, deposes and testifies as follows:

Mr. AXTELL. I may say that this man says he is a sailor. I can narrate this one if that will save time here.
The COURT. You had better read it.
Mr. AXTELL (reading):
"Direct examination by Mr. AXTELL:
"Q. You are a sailor? A. No; a wiper.
"Q. Where were you born? A. Philadelphia.
"Q. Father and mother living? A. Mother.
"Q. Where does she live? A. 542 Sixth Avenue, Brooklyn, N. Y.
"Q. That is your home? A. No; I make my home in Baltimore; that is my mother's address.
"Q. What is that address? A. 802 South Broadway.
"Q. Still going to sea? A. Yes.
"Q. Expect to go to sea again? A. Yes.
"Q. Within a short time? A. As soon as possible.
"Q. Were you on the S. S. 'Coelleda' at one time? A. Yes.
"Q. Did you know a boy by the name of Lustgarten? A. Yes.
"Q. What was he? A. A. B.
"Q. Do you know anything about any accident to him. A. Yes; I seen it.
"Q. What part of the ship was it on? A. Midships, port side.
"Q. Do you remember where the ship was? A. 4 or 5 days out from Swansea, Wales.
"Q. What were the weather conditions prevailing? A. Big swell, rough seas.
141 "Q. How long had the ship been in heavy weather before that? A. Ever since we left Swansea.

"Q. How was she loaded? A. Right down to the water line.
"Q. With what? A. Coal, full capacity.
"Q. Did you notice her Plimsol mark? A. I don't know whether she had one.
"Q. How much freeboard did she have on her well deck when she was on even keel? A. Four or five feet to my knowledge.
"Q. Did she have a bulwark on her deck?"

May we agree that "the freeboard" means the distance between the main deck and the water level? I mean, I do not know whether the jury knows all that.

Mr. LANDIS. Yes, but I do not see that that is particularly pertinent.

Mr. AXTELL. That means the level of the well deck.

Mr. LANDIS. It does not show or appear when he made that observation.

Mr. AXTELL. He says on leaving port. It is just a question of the term, that is all. I wanted the jury to understand the deposition as we read it rather than explain it by an expert afterwards.

"A. Yes.
"Q. That is a solid rail? A. Yes.
"Q. This happened on midships deck? A. Yes.
"Q. That is higher than the well deck? A. Yes.
"Q. How much. A. 7 or 8 feet.
"Q. And where with reference to galley? A. 25 feet or 35 feet from galley.
"Q. Where the accident happened? A. Yes.
142 "Q. Tell what you saw happen? A. He brought this slop bucket out of the galley with slops and ashes in it and they were hot ashes, because I seen steam coming out.
"Q. How big was it? A. Two and one-half feet or three feet.
"Q. High? A. Yes.
"Q. How wide? A. Two feet in diameter.
"Q. Was he alone? A. Yes.
"Q. What did he do? He dragged it down the deck from the galley to the deck where he is suposed to dump it. He put his foot through the rail to steady himself and lifted the bucket up and as he did it and tilted it over, a spray came up and hit him in his face and then the sea came up and knocked the ashes over his shoulder and the bucket went over his head and just then I saw two of the A. Bs. that were standing there go down and pick him up and he came into his room.
"Q. How much water came over? A. That I can't say very clearly, but the spray came up on the bridge deck and right over to the well deck.
"Q. You saw a spray; what do you mean? A. The spray hit him first and then the wave came up and hit the bucket.
"Q. How high was that from the deck? A. Four feet.
"Q. This sea came up about four feet? A. Yes.
"Q. And he was carried from there? A. Yes.

"Q. How far? A. 50 feet to his room.

"By the water? A. No; the water just knocked him back about 6 feet or 8 feet.

"Q. Where was bucket afterwards? A. Fell down, rolled down on ship's side.

"Q. Any ash chute on that ship? A. Yes; but they were stored away on the aft peak.

143 "Q. Had it been up during the voyage? A. Not that voyage it hadn't been up. They were taken in the trip before when we got to Baltimore.

"Q. Was there any permanent ash chute? A. There were rings there for it to be secured by.

"Q. What was the construction, design, and size? A. The ash chute itself was about 3½ feet long.

"Q. What was it made of? A. Wood or iron.

"Q. Was it heavy construction? A. Pretty heavy.

"Q. It could be lashed down? A. Yes; it could be lashed to ring bolts, and secured that way.

"Q. When did you last see it up on that ship? A. Trip before going to Baltimore.

"Q. Was it up going across that trip? A. No; not that trip.

"Q. Wasn't used the whole voyage going or coming? A. No, sir.

"Q. What was done with Lustgarten after the accident? A. I didn't see him after the accident; he stayed in his bunk all that day and the next day the captain told him he better go to work and Lustgarten said he was"——

Do you want that stricken out?

The COURT. Do you want that stricken out?

Mr. LANDIS. Yes.

Mr. AXTELL (continuing reading):

"Q. You heard him say that? A. Yes; he told the captain he was sick."

Mr. AXTELL. I didn't know he was there.

"Q. What was his appearance—or what did you note, if anything, about his appearance at that time? A. After the accident, the

144 next day when I see Lustgarten in his room, I asked him to show me his chest and he stripped and he had all blisters over his back where the hot ashes had gone over his back.

"Q. Did you notice the marks? A. On his side, and his one eye was closed and he was complaining about having something in his eye.

"Q. Any bruises or marks on his forehead? A. On here [witness indicated place right between eyes].

"Q. How did the man look or act? A. Pretty sick the next day.

"Q. Was he eating? A. No; he couldn't.

"Q. Did he go to work after the captain told him? A. Yes; as P. O. mess man.

"Q. Was he working? A. I seen him working or dragging himself around trying to work.

"Q. Did you see him before the accident? How did he look then? A. Yes, sir; fine and healthy.

"Q. Did he have any idea"——

Mr. LANDIS. I object to this.

The COURT. He asked him whether he had any coughing or spitting?

Mr. AXTELL. I do not get that.

The COURT. You may ask the question as to whether he had any coughing or spitting.

Mr. AXTELL (reading):

"Q. Did he have any coughing or spitting? A. No; he was the last man I would say had that.

"Q. After the accident? A. After, I noticed he spit blood.

"Q. What did you notice? A. He or I used to go up and sit with him and every time he would cough he would cough blood and there would be blood all over.

145 "Q. How many times did you see that? A. Four or five times in one night.

"Q. Was he working at that time? A. He was.

"Q. Did he at any time make any protest to the master or officers about working? A. Just the time I told you about and the captain said he had better go to work.

"Q. What kind of a looking man was the captain?"

Mr. LANDIS. I object to that, if your honor please.

The COURT. Objection sustained.

Mr. AXTELL. Exception. I will omit the other questions relating to the description. Page 9, the question on top of the record. I suppose your honor will sustain the objection? That will be sustained?

The COURT. Yes.

Mr. AXTELL. I suppose I had better omit the next questions then.

The COURT. Yes, I think so.

Mr. AXTELL. If your honor wishes me to keep that element out of this case I shall try my best to do so.

"Q. Did Lustgarten come right to New York? A. No, they put him off in the hospital at Punta del Garda."

Well, we do not want that. There is no use to read that. And the doctors examined him; we will omit that, with your consent, Mr. Landis.

"Q. How did she steer going over? A. Steered good.

146 "Q. Did you notice the wake of the ship going over? A. Yes.

"Q. How would you see it in rough weather? A. You can always see it in any weather.

"Q. What were the conditions? A. You can see it for 50 yards. One minute it is this way, and one that way.

"Q. What was the effect of that on the ship as to the seas coming aboard?"

Mr. LANDIS. If your honor please, I object to that. This man is not an expert. He was a wiper down in the engine room and he does not know what the effect of seas coming aboard that ship was. It certainly calls for an opinion, if your honor please, and this man is not qualified as an expert.

Mr. AXTELL. I won't press it.

The COURT. Just a minute.

Mr. AXTELL. I will omit all that page, your honor.

The COURT. Just a minute. In view of the testimony on page 5 I will hear you in the morning on the objection as to this line of testimony, as to the effect of the seas. My prior ruling was based upon the plaintiff's testimony and did not have anything to do with the accident. It may be material in view of the testimony on page 5. But you can reserve that until the morning.

Mr. AXTELL. Yes. Of course we made the claim in the complaint that it did have a bearing.

The COURT. I assumed that the plaintiff's testimony would be corroborated.

Mr. AXTELL. I am over at page 11, I believe. I will omit
147 that testimony on page 9, it seems to be hearsay, down at the bottom mostly.

The COURT. I thought you were on page 11.

Mr. AXTELL. I was too far. Yes, I wish to omit 10, too. Now, at page 11 (reading):

"Q. Do you know anything about any leak in the ship? A. Yes, aft peak.

"Q. When did you see it? A. Before we left port I went straight down and saw it myself.

"Q. Could you see water coming in? A. Couldn't see water coming in, but the first assistant and myself went down and opened steam jet and tried to get the water out.

"Q. Did you succeed? A. No.

"Q. Did you notice whether any stores were in the water? Did the captain get them out? A. No, sir.

"Q. Went to sea with them in the water? A. Yes.

"Q. Did you notice any wire there? A. Two brand new wire hawsers.

"Q. Were they lashed? A. No, sir.

"Q. Did you see them afterward? A. I seen them when they were trying to get them out in New York afterwards.

"Q. You saw wire coming out? A. Yes.

"Q. What was its condition? A. All wrinkled and crumpled up, not fit for use.

"Q. How did they get it out? A. Pulled it up by winch through hatchway."

Mr. LANDIS. This is all immaterial.

Mr. AXTELL. It only relates to the behavior of the ship and its rolling, and the tearing off of the cover of the fresh-water
148 tank off the Azores. The ship went to sea, as we allege in the

bill of particulars, with this after peak full of stores, not secured, and the rolling of the ship tore off the cover of the fresh-water tank, making it necessary to put into the Azores.

Mr. LANDIS. That all occurred after the accident happened. They went in to the Azores for this plaintiff's benefit, because they got there at least four days before they could get to New York.

Mr. AXTELL. The Azores is not a very good place to land a sick man.

Mr. LANDIS. That is a question——

Mr. AXTELL. Had the vessel been seaworthy in making this trip she would have been here at least ten days before.

The COURT. You need not argue this now. What is the question?

Mr. AXTELL. Well, I will omit that.

"Q. Did you see the manhole for fresh-water tank? A. Yes.

"Q. Where did you see that? A. In Baltimore. I tightened it down.

"Q. Did you see it in the Azores? A. Yes, when I went down to see the leak."

Mr. LANDIS. If your honor please, there is nothing to identify all this with the accident in any way. It all occurred, as a matter of fact, after the accident happened, and why this should go in and clutter up the evidence that is being placed before the jury in this very complicated case anyway, I do not understand. I do not think it should. All of this occurred after the accident it supposed to have happened. The manhole cover was torn off on the 11th. That is five days, six days, after the accident is supposed to have occurred.

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Mr. AXTELL. It is merely evidence of the unseaworthy condition of that ship on leaving Swansea, Wales.

The COURT. Mr. Axtell, the ship may have been grossly unseaworthy, but that must be the proximate cause of this accident.

Mr. AXTELL. She was rolling; that was the important part of it. We want to show how she rolled and pitched, tearing herself to pieces all inside.

The COURT. Tearing herself to pieces inside certainly did not affect this man.

Mr. AXTELL. It is evidence of the degree of rolling.

The COURT. The only evidence that has any connection between all of this testimony and this accident is that he got hit in the back, as he testified, or as one of these witnesses testified, hit in the face with spray.

Mr. AXTELL. I shall not press that part of it. I will omit the rest of pages 12 and 13. That brings up the cross-examination.

Cross-examination (read by Mr. LANDIS):

Mr. LANDIS. I am probably going to read this whole cross-examination. I did not know whether you wanted to let that go until to-morrow or proceed now.

The COURT. No; let us get through with this deposition.

Mr. LANDIS (reading):

150 "Q. Did you see the accident? A. Yes.

"Q. How far from the accident were you when it occurred? A. Between 10 and 15 feet."

The COURT. What page is this?

Mr. LANDIS. Sir?

The COURT. What page is this?

Mr. LANDIS That is at page 14. I left the first out.

The COURT. All right.

Mr. LANDIS (continuing reading):

"Q. What deck? A. Bridge deck.

"Q. Is that where the accident occurred? A. Yes.

"Q. On the bridge deck? A. Yes.

"Q. Forward or aft? A. Aft.

"Q. Were you looking in that direction? A. Right in that direction when the accident happened.

"Q. What time of day was this? A. Between six and seven in the evening.

"Q. What time did you have supper? A. Five.

"Q. Are you sure it was between six and seven in the evening? A. Yes.

"Q. What time of year was it? A. February, 1926—no, March, 1926.

"Q. Were there any lights on this deck A. No; lights there but they weren't on.

"Q. Dark or daylight? A. Getting dark.

"Q. How far out were you from Swansea when the accident occurred? A. Four or five days; I am not sure which.

"Q. And your course was southwest? A. I can't answer that question; I don't know what the course was.

"Q. Could you see the accident clearly? A. Yes.

151 "Q. The darkness didn't interfere with you? A. No.

"Q. How did you happen to be there? A. I was standing talking to two sailors when the accident occurred.

"Q. Did you see anybody else around? A. Just the two sailors who picked him up.

"Q. Do you know what their names were? A. Tyburski and Gaft."

It is "G-a-f-t" here. G-r-a-f-f was the man.

Mr. AXTELL. Graff.

Mr. LANDIS (continuing reading).

"Q. Did you see them make any effort to help this man with the pail of ashes? A. No effort to help him with the pail of ashes.

"Q. How far was this from the galley? A. 25 or 30 feet.

"Q. How did it happen he had to drag it that far? A. That's the way he had to do it.

"Q. Why? A. Unless he wanted to carry it down the steps and across.

"Q. Why couldn't he dump it there? A. It isn't on side of ship.

"Q. It is 25 or 30 feet away and he went immediately over there."

Mr. LANDIS. Well, that is out, too. [Continuing reading:]

"Q. How large?"

Mr. LANDIS. Well, I will let that go. [Continuing reading:]

"Q. Did you watch the whole progress of his dragging the bucket from the galley? A. Yes.

152 "Q. And you saw him put his foot through the rail? A. Yes.

"Q. And you could see that plainly? A. Yes.

"Q. He put his foot through the rail before he lifted the bucket up? A. Yes.

"Q. What kind of a rail was it? A. Iron rail.

"Q. What else? A. It's to keep you from falling. Two rails there, front to stanchion and then a chain rail run around to ladder, these two iron rails to ladder.

"Q. The chain is outside and the iron inside. A. No, iron is on outside and the chain runs inside.

"Q. He had to lift the bucket up to the top rail? A. Yes.

"Q. How far up? A. Four feet.

"Q. Above deck? A. Yes.

"Q. How much do you suppose this bucket full of ashes weighed? A. (No answer.)

"Q. Have you ever lifted the bucket? A. Not that particular bucket.

"Q. One similar? A. Yes.

"Q. How much did it weigh? A. 200 to 250 pounds.

"Q. Did you lift it yourself? A. Yes.

"Q. How much did Lustgarten weigh? A. When he came aboard ship you mean?

"Q. Yes. A. About 160 pounds.

"Q. How old was he do you suppose? A. 23 or 24.

"Q. How tall? A. Five feet six inches.

"Q. Would you say the bucket Lustgarten had was as big as the one you describe? A. Yes.

"Q. The same sort? A. On the same principle but too heavy for him to lift.

"Q. Had he gotten practically up on the rail when the wave came along? A. Just got it to rail.

153 "Q. Was it posed on rail? A. Just a little went out when the wave came over.

"Q. Did you see the little that went out? A. Yes.

"Q. What do you suppose that was? A. Just a little, it didn't go over side, it just fell on deck.

"Q. Describe again what water came over and next accident? A. Wave came over about 4 feet from rail and Lustgarten was standing——

"Q. Did you say something about a spray? A. Spray came first.
"What effect did this have? A. Got into his eyes.
"Q. Knock him over? A. Not the spray; it was the wave.
"Q. How far above rail did the crest of the wave come? A. Rail, not deck.
"Q. Rail where bucket was? A. Four feet.
"Q. Four feet above rail? A. Yes.
"Q. First it hit bucket and knocked it out of his hands and then knocked him and knocked it on Lustgarten? A. Yes.
"Q. How far did he get thrown? A. About three feet.
"Q. Which direction; back toward the galley? A. Yes.
"Q. Where did the bucket fall? A. Over side of rail.
"Q. What did you do? A. Stood there while they picked him up.
"Q. You didn't go over? A. No; two sailors got there first.
"Q. Did you see what happened the ashes? A. I don't know what became of bucket after that.
"Q. I don't mean the bucket; what happened the ashes? A. I don't know.
154 "Q. You remember perfectly the few he dumped out, but you don't remember what happened them after the accident? A. No.
"Q. Was there anybody else immediately around Lustgarten at the time these two seamen picked him up and took him to the captain? A. Just the one man coming over the deck.
"Q. No officers of the ship? A. No; no officers were around.
"Q. How did it happen that you were so interested in what he was doing that you watched him so closely? A. I was looking at seas that were running at the time.
"Q. Then you weren't looking at him? A. In his direction.
"Q. Forward or aft? A. Aft.
"Q. What sort of a sea was running? A. High, 20 or 30 feet high.
"Q. What direction? A. Head on.
"Q. Coming over port side? A. The starboard side.
"Q. Port or starboard? A. Starboard side, lee side he was on but bad steering made them cover over the port side.
"Q. How big a wave was it that struck Lustgarten? A. 25 or 30 feet high.
"Q. Were all the waves the same size? A. Different sizes.
"Q. Was that exceptional? An exceptionally large wave for the particular sea that was running? A. Not then; we had higher than that.
"Q. Much wind? A. No; decks were flooded.
"Q. Were you ever in a hurricane? A. Yes.
"Q. When? A. In 1924, in China.
"Q. Never in hurricane on this trip? A. I don't know what you would call that, but it was just as bad as the one that we were in in China.

155 "Q. According to the testimony you gave on direct examination this was just half as large as the worst you have been in? A. Just half as large and sometimes worse.

"Q. At the time of the accident? A. I told you when it happened it was 25 or 30 feet high.

"Q. Lustgarten didn't get thrown up against the rail? A. No; thrown away from the rail.

"Q. You didn't feel concerned about him at all? A. The two sailors beat me to it; they already had him up when I got there.

"Q. But you testified that the last time you saw this ash chute was prior to the ship's going into Baltimore the last trip? A. Yes, it was.

"Q. How many ash chutes did they have? A. Two.

"Q. How many places? A. Two places midships, one starboard and one port, and they can lash it aft.

"Q. Was this a large enough sea to wreck a chute if it was up? A. No; if it was lashed down.

"Q. Is it your experience that in high seas ash chutes are left out? A. I have seen them out but lashed down.

"Q. Is it the general custom of the ship to have it out? A. I have been on a couple that didn't have any.

"Q. That doesn't answer my question; have you been on ships where the ash chutes were taken off? A. Only to paint.

"Q. Never taken them off in ships you have been on because of high weather? A. No.

"Q. And you swear that it was never used on this voyage either across to England or back? A. No.

"Q. When did you next see Lustgarten after the accident occurred? A. Yesterday."

156 Mr. LANDIS. That deposition was taken January 14, 1927 [continuing reading]:

"Q. When? A. Yesterday.

"Q. That isn't the question I asked? A. You mean the next time after the accident?

"Q. Yes. A. The next day.

"Q. What time? A. Three o'clock the next afternoon.

"Q. What were the hours that you were on duty? A. Eight in the morning until 5 in the evening.

"Q. Were those always your hours on that ship? A. On that ship I was oiler, water tender, fireman, wiper, and everything.

"Q. How did it happen you left your duties to go up and make a friendly call on Lustgarten? A. I used to come up for coffee every afternoon when I could get it.

"Q. Was that the custom? A. It was on pretty near every ship I have been on but that one.

"Q. How long did you take? A. About 20 minutes.

"Q. How long did you talk with Lustgarten? A. Ten minutes.

"Q. Was anyone present? A. There was another man sick in the hospital with him.

"Q. How many beds in the hospital? A. Two beds, needed three.
"Q. What was the name of the man that was present at that time? A. I can't think of his name; he was an ordinary seaman.
"Q. Was Lustgarten in bed? A. Yes.
"Q. You testified, did you not, that you saw Lustgarten stripped? A. Yes; I did see Lustgarten stripped.
157 "Q. How did he happen to do that? A. I asked him to show me his body.
"Q. Did he take off all of his night clothing? A. Everything off.
"Q. What did you see? A. Blisters and scars on his back where the ashes burned him and his eye was closed and he complained about it and there was a mark between his eyes and his side was black and blue.
"Q. Did he attempt to explain how the blisters got on his back? A. From the ashes.
"Q. Did he attempt to explain how they got there? A. That bucket come over and hit his shoulder.
"Q. How much of his back from the shoulder? A. From his shoulder to about 6 inches down his back.
"Q. Just the back with blisters? A. Yes.
"Q. None on front of his body? A. None on front of him.
"Q. Did you hear any conversation between the captain of the ship and Lustgarten on the day following the accident? A. Not on the day following the accident but the day following I did.
"Q. Second day after? A. Yes.
"Q. What time? A. About five-thirty or six.
"Q. Was Lustgarten in bed? A. Yes."
"Q. When did you see him cough blood the first time you seen him? A. The day after the accident.
"Q. At three o'clock in the afternoon? A. Yes.
"Q. How many times did he cough blood? A. Three times in the afternoon and four times that same night."
The COURT: What page is that?
Mr. LANDIS: That is page 26.
158 "A. Three times in the afternoon and four times that same night."
"Q. Did you at any time while in England leave this ship without leave? A. Yes; in Manchester."
This is on page 29 [reading]:
"Q. Is that the only time? A. Yes; without leave.
"Q. You weren't absent from duty at Swansea? A. Yes; I was absent from duty at Swansea.
"Q. Did you refuse to turn to at Avenmouth? A. No; I didn't refuse to turn to.
"Q. Is it the practice of you to leave ships without leave? A. No.
"Q. How did you happen to do it in this case? A. To get something to eat.
"Q. Did you have any leave while you were in England? A. Did I have any leave? Why, yes.

"Q Did you have any leave in Manchester? A. Yes.
"Q. Swansea? A. Yes.
"Q. Avenmouth? A. Yes."
Mr. LANDIS. That is all.
Mr. AXTELL. There is one question at the bottom of page 27. [Reading:]
"Q. Any other evidence of his getting worse as the voyage continued?"
Mr. LANDIS. I object—go ahead.
Mr. AXTELL (reading):
"A. His eyes were sinking back in his head."
This is a question on page 28. [Reading:]
159 "Q. Did Lustgarten walk off that ship? A. He got helped down the ladder from the ship.
"Q. Who helped him down? A. Two sailors helped him down.
"Q. Was the ship at a dock right up to safe anchorage taking on oil? Taking on oil; yes.
"Q. Lustgarten didn't fall going down the ladder? A. No."
And then, at the end. [Reading]:
"Q. Did you encounter heavy seas all the time from the time you left Swansea to the Azores? A. Yes, and worse after."
Mr. AXTELL. That is all.
The COURT. We will take a recess until 10.30 to-morrow morning, gentlemen.

Adjourned to Thursday, June 16, 1927, at 10.30 o'clock a. m.

NEW YORK, *June 16, 1927.*

Mr. AXTELL. I will read the deposition of Mr. Charles Smith.
"Direct examination by Mr. AXTELL:
"Q. What is your name? A. Charles Smith.
"Q. A little deaf, are you? A. Yes.
"Q. Were you on the SS. 'Coelleda' with Lustgarten when he was there? A. Yes.
"Q. What were you? A. Wiper.
"Q. Do you know anything about the accident? A. I only know about the next day. I seen his eye; it was swollen and red and I asked him what happened and he told me."
160 Mr. LANDIS. If your honor please, I am going to prove to strike out that answer in that case. It is proving the accident by hearsay.
Mr. AXTELL. But I am not repeating what he told him.
The COURT. Is this the deposition of Charles Smith?
Mr. AXTELL. Yes.
Mr. LANDIS. He asked him did he know anything about the accident, and he answers saying, "And I asked him what happened and he told me."

Mr. AXTELL. He said, "I seen his eye; it was swollen and red and"—that is enough.

Mr. LANDIS. The question speaks of an accident which Mr. Smith never saw and knows nothing about.

Mr. AXTELL. It is too late to object to the question.

The COURT. Which question is it?

Mr. AXTELL: "Q. Do you know anything about the accident?" Then I asked leave to read into the record, "I seen his eye; it was swollen and red."

The COURT. That may be allowed.

Mr. LANDIS. May I have an exception?

Mr. AXTELL. Question on page 3.

"Q. Did you see him before that on the way over? A. Yes.

"Q. What was his general appearance and condition of health? A. Well, he looked like he could face a physical examination to me, he must be to get A. B. ticket."

Mr. LANDIS. If your honor please, I move to strike out the answer to that question.

161 Mr. AXTELL. Strike out, "he must be," that is a conclusion. I consent to that. [Continuing reading:]

"Q. After the accident did you notice any difference in his appearance and condition? A. Yes, sir.

"Q. What? A. Like blood coming out of his eye and mouth like.

"Q. You saw blood coming out? A. Yes.

"Q. How much from his mouth? A. Well, a hemorrhage.

"Q. A hemorrhage? A. Well, may be not a hemorrhage, but when he would spit he would spit blood.

"Q. How many times would you notice this? A. I can't say how many times I seen him during the day when I passed the room.

"Q. Did he complain to anyone of any pain or suffering or any injury to his lungs or chest?"

Mr. LANDIS. I object to that, if your honor please.

The COURT. Yes.

Mr. AXTELL (continuing reading):

"Q. Did you notice any injury? A. No; but he couldn't talk, at least I couldn't hear him after that.

"Q. Did you notice that before? A. I went ashore with him, but he talked loud enough for me to hear.

"Q. You were deaf then? A. Yes.

"Q. You had no accident on this ship?"

Mr. LANDIS. I object to that.

Mr. AXTELL. I won't press that. There is nothing more on that page. I won't press that at the top either, since he does not know.

162 Mr. LANDIS. At the top of page 5?

Mr. AXTELL. Yes.

Mr. LANDIS. Then I will read it in if you do not.

Mr. AXTELL. Well, if you want it in, certainly. You can read it now or I will read it. Which part is it that you want to read and it will save an interruption?

Mr. LANDIS. Down here [indicating].

Mr. AXTELL. On page 4?

Mr. LANDIS. The bottom questions.

Mr. AXTELL (continuing reading):

"Q. Did you notice whether there was an ash chute on that boat at any time? A. Yes; they had it on several different places; they shoved it around several times.

"Q. How long were you on that boat? A. Five months altogether.

"Q. At the time of the accident was there any ash chute up? A. (No answer.)

"Q. At the time of the accident do you know whether there was any ash chute lashed on the deck? A. I don't know; it has been a year ago since I was there.

"Q. You don't know anything about that? A. Yes.

"Q. That is all you know about this case? A. I don't know much about this Lustgarten case.

"Q. Did you notice anything about the steering of the ship?"

Mr. LANDIS. Well, that is not it.

Mr. AXTELL. What is the use of reading that? Page 6. [Continuing reading:]

"Q. Did you notice how much freeboard she had, that is,
163 between level of water and after well deck, after she left port of Swansea? A. When she left Swansea—well before we left Swansea—there was water coming out of ship after and after they kept loading her down with coal she kept leaking aft.

"Q. Did you notice the distance from the water up to her well deck after from the time she left port, that is how much freeboard she had, the distance between the water and the level of the deck? I am speaking of the aft well deck, the distance as you stand and look over the rail. A. Well, she was loaded pretty deep; I couldn't say how far but I know she was loaded below that insurance mark and then every day when she was leaking it would go down a little further.

"Q. How did she compare as to depth in the water, as to the trip going over? A. She was loaded. That trip coming back was the worst; she was going down that ship."

Mr. LANDIS. If your honor please, I object to that and move to strike it out.

The COURT. Strike it out.

Mr. AXTELL (continuing reading):

"Q. How did that compare with any other trip? A. I was never on.

"Q. But this ship you were on before, weren't you? A. The trip before.

"Q. How was she loaded that time?"

Mr. LANDIS. If your honor please, it has not anything to do with this case.

The COURT. Sustained.

Mr. AXTELL. Exception. That is all.

Mr. LANDIS (reading):

164 "Cross-examination by Mr. LANDIS:

"Q. Did you see blood coming out of this man's eye? A. It was all bloodshot. And every time he would wipe his eye there was some kind of ashes there and all over his eye it was bloodshot.

"Q. Was his eye bleeding a great deal? A. Not a great deal.

"Q. On what day was this? A. After the accident about two days.

"Q. Did you say two days after the accident, about? A. Day after.

"Q. You didn't see him two days after? A. Once or twice after in the galley working.

"Q. Did Lustgarten, the second cook, wait on the table at all petty officers' meals? A. One meal.

"Q. Did you look at her marks the day before she sailed at noon? A. Not the day before, no."

Mr. AXTELL. I will read the deposition of Robert Amundsen. He is the next one. This is a deposition taken on the 10th of September, 1926. [Reading:]

"Direct examination by Mr. AXTELL:

"Q. What is you name? A. Robert Amundsen.

"Q. What is your occupation? A. A. B.

"Q. A seaman? A. Yes.

"Q. You go to sea for a living? A. Supposed to.

"Q. Are you a ship now? A. No; I just left one about ten days ago.

"Q. Do you expect to go to sea soon? A. As soon as I get away from here.

"Q. Were you a seaman on the steamship 'Coelleda'? A. Yes.

"Q. Do you recall the date you signed on? A. On the 10th of October.

165 "Q. You mean the last trip? A. The last trip.

"Q. When did you sign on? A. The 28th of October, 1925.

"Q. You had been on the ship some time previous? A. Two previous—before.

"Q. And on that voyage where did the vessel go? A. On the last trip?

"Q. Yes. A. Went to Manchester, Avonmouth and Swansea, Wales.

"Q. Do you recall Benjamin Lustgarten on that vessel? A. Yes.

"Q. What was his job on that trip? A. He came aboard as an A. B., but then he got second cook's job after Damico got sick.

"Q. On the last voyage that you made on the 'Coelleda' you signed on the 20th of January, 1926 (and not on October 28, 1925 as you stated before), is that right? A. Yes, that is right.

"Q. You had been on that ship for two voyages before? A. Yes.

"Q. Was Lustgarten on the vessel for more than one voyage? A. I am not quite sure if he was or not; they was changing right along. I do not think he was; I think only on the last trip.

"Q. And that is the voyage you signed on January 20, 1926? A. Yes.

"Q. Do you recall any accident to Lustgarten on this voyage? A. Yes.

"Q. On the return voyage? A. Yes, from Swansea.

"Q. The vessel was proceeding toward the United States? A. Yes.

"Q. How far was the vessel from Swansea? A. I can not tell you exactly. I think it was at the beginning of the voyage, about three or four days out, or five, something like that; I do not know
166 exactly. I know that it was beginning of the trip.

"Q. Did you see the accident to Lustgarten? A. Yes, I did.

"Q. Where were you? A. I was coming right out from the boat I was going toward midships.

"Q. And where was Lustgarten? A. He was right at the rail trying to dump his ash pail, or garbage can, or whatever you call it.

"Q. On what part of the ship was Lustgarten? A. On the port side, going to the after part of the midships section.

"Q. Is that right at the break of the line next to the well deck? A. Yes; that is right under the well deck.

"Q. Now, what was he doing? A. He was just lifting his ash pail, when the sea came over and sprayed the oil that was on the deck on to him.

"Q. How large was the deck? A. About as high as that [indicating]—two and a half feet high and eighteen inches in diameter.

"Q. Now, what did you notice? A. I noticed when the spray came because I made a dive for the bulwark. The next thing I saw it had got him and he doubled over on the rail, and the water struck his chest.

"Q. Could you see what part of his body was on the rail? A. I couldn't see exactly. I could see that he was doubled over the rail that is all.

"Q. How close was he to the rail before this water struck him? A. About a foot, may be.

"Q. That is the best you could tell? A. There is also a small kind of a narrow passageway, and one rail goes this way and one goes out that way [indicating], and he doubled over the rail on the after part, you see.

167 "Q. You mean one rail went forward and the other rail went out on each side to the corner where the two of them

neet, and that is the rail which runs across the afterpart of the hip's house? A. Yes.

"Q. Where did this water come from? A. Right along the hip's side straight from forward aft.

"Q. Which way was the sea coming? A. Dividing into head eas. She was going about a point to starboard.

"Q. What would you say was the condition of the water and the ea at that time? A. It was kind of a rough sea. There was a reeze.

"Q. Did she take any water over forward? A. There was lots f water on forward.

"Q. Did any of this water strike you that struck Lustgarten? A. Just a few drops, because I made a dive.

"Q. Did you observe whether or not there were any ash chutes here that he was using? A. No, there wasn't any.

"Q. Did you have any ash chutes on the ship? A. There was wo in the afterpeak.

"Q. Is there any place on the rail to attach these ash chutes? A. Yes, on each side.

"Q. How long have you been going to sea? A. About twenty-wo years.

"Q. Is it customary to use ash chutes to dump ashes from the alley overboard? A. As a rule they did so.

"Q. Did they have ash chutes attached to this vessel at any time luring the voyage? A. No; they never had them—not while I was aboard there.

"Q. You speak of some oil on the deck. What do you mean by hat? A. They have a circulation tank on the boat and they have to fill it up for the ship's fuel, and as far as I can make out 68 the engineers did not know how to work it, and every time they filled it up"——

Mr. LANDIS. If your honor please, I move to strike out that phase f the testimony, "as far as I can make out."

Mr. AXTELL. I have no objection to it, to striking it out. We will mit the rest of that down to:

"Q. Do you know whether Lustgarten did any work after this ccident? A. I do not think he did.

"Q. Do you know whether or not he did? A. I am not quite ure.

"Q. You can't remember? A. No; I can not remember.

"Q. Did you see him at any time after this accident? A. Yes.

"Q. Did you have any conversation with him? A. I just asked im how he felt and things like that.

"Q. At the time you saw him was he working? A. No.

"Q. Where was he? A. He was in the hospital in Ponta del Garda.

"Q. Do you know how long he was in the hospital? A. Until e got to Ponta del Garda, and they put to shore.

"Q. How long was he on the ship after this alleged accident? A. About ten or twelve days, or something like that; I am not quite sure."

Mr. LANDIS (reading):

"Cross-examination by Mr. McDONALD:

"Q. About what time of the day was it that he was hurt?

169 A. Either just before noon, or just before the afternoon, just between—inside of two hours, about.

"Q. How long had you been watching? A. I was coming along, you see, and I seen him double over.

"Q. Did you see him empty any ashes before that? A. Yes.

"Q. How many did you see? A. Sometimes it was slops and sometimes ashes, and sometimes I helped him myself—they were kind of heavy.

"Q. About how many were there? A. I couldn't tell you how many times. It was about two or three a day. You see, in the morning when they cleaned the fire out, and then there is some shops, and after dinner some more.

"Q. Did they usually dump them over the side of the ship at the same side? A. On the lee side always.

"Q. You say it was on the lee side? A. Yes, the lee side.

"Q. That is what the lee side is used for? A. Yes, and sometimes the port side.

"Q. Would you say the wind was blowing west toward starboard side of the ship? A. As far as I could recollect it was right ahead, but the vessel might have been going to a point to starboard, and that would bring the wind to the port side.

"Q. From what you say, it was probably on the lee side of the ship this day? A. That was the lee side; it was conceded to be the lee side. When the wind is dead ahead, the cook dumps his slops off the nearest rail.

"Q. Had he been dumping slops at the same point all that day? A. Yes.

"Q. Now you said the pipe laid out straight. You don't mean out horizontally?"

170 I will skip all that. Then beginning on page 12 again, speaking of the oil. [Continuing reading:]

"Q. Was it all over the deck? A. Not all over—just in spots—just enough for people to slip on; some came back in lumps and stayed there.

"Q. Did you state whether it was customary to have these chutes for galley slops? A. No, but I have seen them.

"Q. What is gained by the use of this chute? A. When they throw slops away it keeps the ship's side clean. It is easier to handle, and it doesn't have to hang on, you see.

"Q. How high does the chute come up? A. About 18 inches above the rail.

"Q. Did a wave hit Lustgarten at that time? A. Well, it was not exactly a wave—just a heavy spray.

"Q. And what was the effect of that wave on Lustgarten? A. He turned kind of sideways and doubled up.

"Q. It seemed to knock him down? A. Yes.

"Q. It knocked him against the rail? A. Yes. I think he slipped on oil, but I don't know, but there was some oil around.

"Q. You say here he slipped? A. Yes, I saw him slip, and he turned over on the rail.

"Q. After he struck the rail? A. Yes, after he struck the rail.

"Q. But you say here he slipped. A. I was down on the well deck and he was on the midship deck.

"Q. Then when you say he slipped, you got the theory you have, because of some oil on the deck? A. I think he slipped.

"Q. Had Lustgarten been sick in the early part of the voyage? A. No, not as far as I know.

171 "Q. I thought you said, in the early part of your testimony, that Lustgarten was not feeling well. A. Well, he didn't have anything to eat aboard her.

"Q. What rail did Lustgarten strike—the chain rail? A. Yes, the chain rail.

"Q. Do you know what part of Lustgarten's body came in contact with the rail? A. Can not tell you exactly. I saw him when he doubled up.

"Q. You didn't see him when he hit the rail. You saw him when he was doubled over? A. Yes.

"Q. Did you see him when he fell from where he was toward the rail? A. Yes.

"Q. What part of his body struck the rail, if you know? A. Somewhere across his body like this [indicating with his hand].

"Q. Now state again where you were when the sea came over the rail. A. I was abreast of the after mast when I saw the spray coming.

"Q. How far is that from where Lustgarten was? A. I can not tell you exactly; maybe about forty feet.

"Q. And when you saw the water coming you ducked off? A. I ducked underneath the rail.

"Q. And the deck that you were on was how far below the deck that Lustgarten was on? A. About seven feet.

"Q. Is the rail that you ducked under a solid rail? A. A solid bulwark."

Mr. AXTELL. I do not think I will read any more.

Mr. LANDIS. Page 21, and this is what I was looking for.

"Q. If you rig chutes of this kind, you would need one on each side? A. Yes, one on each side. The first time we put them
172 up a wave came along and knocked them away. It is no use to put them out.

"Q. Then if the weather was rough, it would not be wise to have them rigged? A. No, not if the weather is rough."

Mr. AXTELL. There is one more deposition, your honor, and I will omit as much of this as possible, gentlemen. It is the deposition of Edward W. Graff. [Reading:]

"Direct examination by Mr. S. B. AXTELL:

"Q. What is your occupation? A. Seaman, sailor, A. B.

"Q. How old are you? A. 29.

"Q. Where were you born? A. Boston, Mass.

"Q. What was your last ship? A. 'Artigus.'

"Q. What was your job on her? A. Bos'n.

"Q. Is that operated by the Shipping Board? A. Yes.

"Q. Do you know Lustgarten, the plaintiff who is sitting here?"

This deposition was taken quite recently, I think. The 16th of May, 1927. [Continuing reading:]

"A. Just the one trip.

"Q. When did you see him again after that? A. When he was coming here. He was getting off a train at South Ferry when we were going aboard, one night, that was when he came in on another vessel.

"Q. And you happened to meet him? A. Yes, we were taking the train.

"Q. When did you see him next? A. Just the other day.

173 "Q. Is he any special friend of yours? A. No, just a shipmate, that is all.

"Q. Do you know anything about an accident that occurred to him in the month of March?"

Mr. LANDIS. It appears that this man did not see any accident, and I objected to that question at the time.

The COURT. There is no answer. Next question.

Mr. AXTELL (continuing reading):

"Q. When did you first see Mr. Lustgarten on the ship? A. The day he came aboard.

"Q. Describe his physical condition? A. Pretty good to me; he carried his suit cases aboard without any trouble and brought them aft without any trouble.

"Q. And you seen him after that? A. Every day.

"Q. Did he go to England on the ship? A. Yes, he came to Manchester with us.

"Did you see him after leaving there? A. All the way around until we got Swansea.

"Q. Did he change his employment? A. Yes.

"Q. What change? A. A. B. to second cook.

"Q. What was his physical condition and appearance? A. Very good.

Q. You see this condition to-day. Any difference between his appearance now and then? A. Very much. Well, he looked a lot better, healthier, better complexion, and he didn't have no eyeglasses.

"Mr. AXTELL. Take off your eyeglasses, Mr. Lustgarten.

"Q. Look at him without his eyeglasses. What difference do you see?

174 "A. Much different complexion and his eyes are practically shut and they were open then.

"Q. Did he blink his eyes then as he does now, continually? A. No.

"Q. How about the size, his size, and weight as compared with the present and before the accident?

"A. Well, height about the same, but he must have weighed about 10 or 15 pounds more than he does now.

"Q. He was then? A. Yes, filled out more in the face.

"Q. Tell me of any occurrence you know or saw on the ship with regard to Lustgarten on the way home from Manchester. A. In what respect?

"Q. Well, do you know of any change in his physical condition on the way home? A. Not until after the accident."

Mr. LANDIS. I move to strike that answer out, because this witness did not see the accident.

The COURT. What page is it?

Mr. LANDIS. It is on page 6.

Mr. AXTELL. He does not pretend that he saw it.

Mr LANDIS. It makes the appearance that all these men were actual witnesses to the accident, which is not true. They only have two men who saw this accident.

The COURT. Which is the question?

Mr. LANDIS. I move to strike out the answer about a third of the way down the page, "Not until after the accident." The question is, "Well, do you know of any change in his physical condition on the way home? A. Not until after the accident."

175 The COURT. He may answer.

Mr. AXTELL. We have proven it was an accident, and this is only used to fix the time.

Mr. LANDIS. No, there is a question in dispute.

The COURT. You need not argue it; I have ruled on it.

Mr. AXTELL. I did not get your ruling, your Honor.

The COURT. I will take the answer.

Mr. LANDIS. May I have an exception, if your Honor please?

Mr. AXTELL (continuing reading):

"A. Not until after the accident.

"Q. What accident do you refer to? A. Accident by the sea.

"Q. What do you know? A. I came up there as the man was coming out of the hospital"——

Mr. LANDIS. I am going to move to strike the rest out.

Mr. AXTELL. It might be considered parts of the rest, I suppose.

The COURT. There is no evidence that he saw any accident. He says he did not, gentlemen, but is telling how the matter came about that he heard of the accident. I will take it for what it is worth.

Mr. AXTELL (continuing reading):

"A. I came up there as the man was coming out of the hospital and he said a man was hit.

"Q. Did you see Lustgarten after at the hospital? A. Yes.
"Q. Did you see him before? A. What?
"Q. Did you go into the hospital? A. I did.
176 "Q. Did you see Lustgarten? A. I did.
"Q. What was his condition? A. He was lying on the bunk and looked like he was in pain.
"Q. Did you notice anything about his face or head? A. I didn't pay any attention.
"Q. Did you at any time after that notice anything? A. Yes, a day or two later I was in the galley and he was mixing bread and I was talking to him and he had a coughing spell and vomited a clot of blood into the bread and I also seen him later on and his face was swollen all around here (near chin and mouth) practically from ear to ear.
"Q. Do you know how long he was laid up in the hospital? A. One or two days, I am not sure.
"Q. Did you see any occurrence between him and captain? A. No, sir.
"Q. Any conversation? A. No, sir.
"Q. How was the weather on the day that you saw him in the hospital? A. Pretty bad, in fact it was bad the whole trip.
"Q. Did you steer the ship? A. Yes, sir.
"Q. Did you steer on the way over? A. Over and back, both ways.
"Q. How did she steer going over? A. Fairly good.
"Q. How coming back? A. Very bad.
"Q. Do you know anything about any water being in the afterpeak? A. Afterpeak was loaded and so was the lazarette, to about six feet.
"Q. How do you know that was so? A. I seen it.
"Q. When did you first see it? A. In Swansea.
"Q. Before sailing? A. Yes.
"Q. How long before? A. Three or four days.
"Q. And you knew it was leaking in the aft peak before you sailed? A. Yes."
177 "Q. Was any protest made in your behalf by any members of the crew? A. Yes; the mate was notified and so was the captain.
"Q. What is your knowledge? A. I was down there with the chief and he said stern gland leaking.
"Q. What is that? A. Some with the rudder.
"Q. Packing around rudder? A. Yes.
"Q. Will you repeat what you heard at this time? A. The lazarette?
"Q. About the leak between the engineers' and the deck officers that you spoke of."

Mr. LANDIS. Where are you now?

Mr. AXTELL. At the top of page 10.

Mr. LANDIS. Well, you skipped some thing.
Mr. AXTELL. Did I?
The COURT. I think not.
Mr. AXTELL. No, I read it all.
Mr. LANDIS. Did you read this part [indicating]?
The COURT. I followed it right along. I think he read everything.
Mr. AXTELL. I did not read it?
The COURT. Yes, I think you did.
Mr. AXTELL. Certainly I did. [Continuing reading:]
"Q. About the leak between the engineers' and the deck officers that you spoke of. A. I was down there with them and they claim——
"Q. Who? A. First assistant and chief engineer.
"Q. Any other officers there? A. I believe the mate was there, I wouldn't say for sure.
"Q. What did you hear said? A. That the stern gland——
178 "Q. Who said that? A. Chief to first.
"Q. Was the captain there or on shore? A. He must have known because I saw him and the mate looking at it one day before he left.
"Q. Did you make any protest or was any protest made to the consul on behalf of the crew?"
Mr. LANDIS. I object to this question, if your Honor please, the second part of the question. I do not object to the first part. "Did you make any protest," but I object to the second part as calling purely for hearsay.
The COURT. The rest of it is purely hearsay because he was not there. I sustain the objection.
Mr. AXTELL (continuing reading):
"Q. Have you made any statement in this case before today? A. No.
"Were you approached by a representative of the defendant with regard to giving your testimony? A. Yes."
Mr. LANDIS. I object to that. What is the difference? It does not matter, but what is the point?
Mr. AXTELL. If you have a valid objection, make it.
Mr. LANDIS. Then I make the objection.
The COURT. I will sustain it as immaterial.
Mr. AXTELL (continuing reading):
"Q. Were you given any subpoena?" Do you object to that?
Mr. LANDIS. We object to that, yes.
Mr. AXTELL. The picture down there that he referred to has been identified. [Continuing reading:]
179 "Q. Is that a picture of the 'Coelleda'? A. It is."
Mr. LANDIS. We will concede it is.
Mr. AXTELL (continuing reading):
"Q. What are those holes in the rail?"

Mr. LANDIS. If your honor please, I am going to object to that question until such time as it is shown that he knows what those holes are.

Mr. AXTELL. It is obvious. This picture is Exhibit No. 5.

Mr. LANDIS. There is no reason under the sun to suppose that those are for the disposal of ashes.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

"Q. What are those holes in the rail? A. They are to make ash chute fast with vessel."

Mr. LANDIS. If your honor please, he admits in the last part of his testimony that he never has seen an ash chute on a Hog Island ship, and how he knows these holes in this particular plate are ash holes, I do not know.

The COURT. If he admits that he did not know what he was talking about and you develop that subsequently, you must credit the jury with some intelligence.

Mr. AXTELL (continuing reading):

"A. They are to make ash chute fast with vessel.

180 "Q. Have you seen them on other vessels? A. Not on Hog Island vessels.

"Q. How do you know? A. It is sort of punch where she is made fast with rail.

"Q. Have you seen such chutes on other vessels? A. Not that type; they usually have them after, over stern.

"Q. Why do you say they are for ash chute then? A. It hooks over this square and then hooks over like this [witness demonstrates with piece of paper].

"Q. If you haven't seen them on other Hog Island vessels, how can you tell? A. I was told by other persons who had seen them before."

Mr. LANDIS. I move to strike out all concerning the holes in this thing. It is obvious that that is improper testimony and founded purely upon hearsay.

The COURT. He was on the ship, wasn't he?

Mr. LANDIS. But he admits never having seen these ash chutes up, and it is only what people told him.

The COURT. He says it hooks over.

"Q. If you haven't seen them on other Hog Island vessels, how can you tell? A. I was told by other persons who have seen them before."

The COURT. I will let it stand.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

"Q. Were those holes there on this trip? A. Yes.

"Q. That is a view of which side of the ship? A. Port.

"Q. I show you another picture and ask you what is that picture:

181 I won't press these questions, because we have already gone over these pictures, and the same ones are in evidence. I won't press the question. Just this question:

"Q. What is distance between outside rail and the house?" That is at the bottom of page 13.

"A. 18" or 2'.

"Q. In order to dump ashes over there is it necessary to go through that rail or over it in some way? A. Yes."

Mr. LANDIS. I object to that on the ground that it calls for an opinion.

The COURT. Sustained.

Mr. AXTELL. I will omit the rest of page 14. Question at the top of page 15:

"Q. How did the 'Coelleda' steer on the way from Swansea? A. Very bad.

"Q. That is an expression that counsel can object to on the trial and the objection very likely will be sustained. If you will explain in detail how she steered so a judge and jury will understand, it will be better. A. You couldn't keep her within point or point and a half of her course unless you watch her pretty carefully."

Mr. LANDIS. I am going to object to this because I believe it is immaterial how that vessel steered at any time.

The COURT. Objection sustained.

Mr. AXTELL. Exception. [Continuing reading:]

"Q. What time was this you saw him in the hospital? A. After supper, between 5.30 and 7, I am not certain.

182 "Q. Who was on the wheel at the time? A. I am not certain.

"Q. Do you know which A. B.'s were on duty at that time? A. Voogd was one, that is 4 to 8 watch and a Frenchman, I can't remember.

"Q. Do you know where the seas were on that day or the lee side of the ship for instance? A. I couldn't testify because they were pretty near dead ahead a little on the starboard.

"Q. If the ship veered a little in steering what would be the effect of seas coming aboard at points aft of the bridge? A. There is a possible chance of seas coming aboard aft of the bridge."

Mr. LANDIS. I am going to object to that, if your honor please, on the ground that it calls for an opinion and calls for an opinion of an expert witness, and in any event it is immaterial.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

"A. There is a possible chance of seas coming aboard aft of the bridge.

"Q. Well, did you observe any time on this trip from Swansea how the seas come on?"

Mr. LANDIS. I object to that, if your honor please, on the same grounds. Its immateriality is a little more apparent, in that it does not matter what he observed during the trip, except on this particular day and at this particular time.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

183 "A. Fairly regular at times.

"Q. Which side? A. Both sides.

"Q. Which deck? A. As far as the bridge deck.

"Q. Is the bridge deck above this deck on which this ash chute is located? A. Same deck.

"Q. You were, as wheelsman, above that deck steering? A. Yes; a little higher than that.

"Q. Two decks above it? A. No; two; well, yes, you could call it two.

"Q. Did you see seas come aboard on this ship? A. Yes; plenty.

"Q. How deep? A. Practically a foot all the time forward.

"Q. On the well deck one deck below, on which this is on? A. Yes."

Mr. LANDIS. Your honor, may I continue to object to all these questions as immaterial?

The COURT. You may.

Mr. LANDIS. I particularly want to object to this one.

Mr. AXTELL. Which one?

Mr. LANDIS. These three regarding the seas coming aboard the boat, as being immaterial. Seas come aboard a ship forward, of course, in any heavy weather.

Mr. AXTELL. Its shows whether she is overloaded or not.

Mr. LANDIS. It certainly does not. Did your honor make a ruling?

The COURT. Do not talk back and forth between yourselves. I said you could object to anything that you like. I have already ruled, and you have an exception.

Mr. LANDIS. Exception.

The COURT. Next question.

184 Mr. AXTELL. An exception is not required in this court, is it, your honor, if we make the record?

The COURT. We raised that without an exception.

Mr. AXTELL (continuing reading):

"Q. Did you see any water on the midship deck on the day of the accident? A. I'm not sure, but I think there was water there every day, a spray or so up there.

"Q. How was the ship as to load? A. Trifle by the head when she left Swansea.

"Q. Fully loaded or not? A. I believe she was.

"Q. What was she loaded with? A. Coal and building stone.

"Q. How many days out of Swansea was she when the accident occurred? A. I don't recall.

"Q. You didn't see any accident, did you? A. No, sir.

"Q. You never said to anyone that you did see an accident, did you? A. No, sir.

"Q. After she got out to sea did you notice any difference as to her being down by the head or down by the stern? A. Down by the head for a day or so until they lightened her up.

"Q. How was she at the time that you saw this boy in the hospital? A. You couldn't tell this because she was pitching and rolling.

"Q. Pitching and rolling? A. Yes.

"Q. How much was she rolling? A. Not so much, more pitching than rolling.

"Q. Did any seas come aboard astern? A. A few over on the after well deck.

"Q. Well, did you observe whether or not when the vessel got off her course a bit in straightening out she would roll more than at other times?"

185 Mr. LANDIS. If your honor please, I object to this question.

The COURT. I will take it.

Mr. AXTELL (continuing reading):

"A. She would, yes.

"Q. That is true of any ship in any weather, is it not? A. Not necessarily.

"Q. Well, if you got her off her course and tried to get her up? A. In steadying her.

"Q. Did this ship on the day of the accident get off her course any?"

There is an objection there.

"Q. Did she on such occasions roll to one side or the other? A. Both ways.

"Q. Do you know whether seas came aboard her when she rolled? A. Yes, the side that she tipped more.

"Q. Do you know whether the water in her aft peak had anything to do with her bad steering, as you call it?"

Mr. LANDIS. I object to that as calling for an opinion.

The COURT. There is no need of objecting; there is no answer.

Mr. AXTELL (continuing reading):

"Q. How long have you been steering? A. 11 years.

"Q. Have you been steering 11 years? A. No, been to sea 11 years.

"Q. How long have you been steering? A. Since 1920.

"Q. You been going steady all that time? A. Well, off and on just a week off from time to time.

186 "Q. You haven't done anything else? A. No, nothing else.

"Q. Were you ever in that lazarette hatch? A. Yes.

"Q. Any time to see what was going on or what was in there? A. Yes, shelves loaded with towing wire and large-size tackle.

"Q. Did the vessel put into Azores? A. Yes.

"Q. Do you know why? A. For oil and water.

"Q. Did she get fresh water there? A. Yes.

"Q. What was the occasion? A. On account of the aft peak.

"Q. On account of what? A. Water was spoiled down there on account of the leak."

I suppose they mean fresh water spoiled.

"Q. Do you know what the situation was? A. The leak did everything.

"Q. The leak wouldn't spoil the water, would it? A. Well, the things that were rolling through the main hold knocked off the top of the tank and allowed salt to get in.

"Q. What made it come off? A. All this junk.

"Q. What junk? A. Tackle, etc.

"Q. Did you look into the place after this? A. Yes.

"Q. What did you see? A. Nothing but a whole mass of wire and a ladder stored away.

"Q. How big was this wire? A. I believe—

"Q. How big a wire? A. Stood 6' high when it was in a roll.

"Q. Did you see the manhole cover?"

The COURT. Does this concern the accident?

Mr. AXTELL. I guess it comes under a ruling your honor made yesterday. I won't press it. [Continuing reading:]

187 "Q. Did you see Lustgarten again after that time in the galley when you seen him and he was spitting blood up? A. Yes.

"Q. What did you notice about him? A. Swelling face and looked kind of down and out.

"Q. Did he continue all the way? A. All the way, no, only to the Azores.

"Q. Did you see him when he left? A. No.

"Q. When before did you see him? A. The day before.

"Q. How did he look then? A. Same appearance, down and out.

"Q. Was he working, do you know? A. I don't remember.

"Q. Don't remember? A. No, sir."

Your witness:

Mr. LANDIS (reading):

"Cross-examination by Mr. LANDIS:

"Q. How many days after you saw him in the hospital did you see him in the galley? A. Two days later.

"Q. Was the chief cook there at the time? A. He was.

"Q. Do you know if they used the dough he spit in or not? A. No, they destroyed it.

"Q. Do you recall seeing Lustgarten in the galley after this time? A. You mean the time he spit the blood?

"Q. Yes. A. Yes.

"Q. How many times? A. Two or three days later.

"Q. He was working at that time? A. No, just there.

188 "Q. You don't recall seeing him work after that? A. I seen him two or three times working in there.

"Q. But you don't recall at this time whether that was before you saw him or after? A. After he was in the hospital.

"Q. Was that after the other times you saw him working, after the time he spit the blood in the dough? A. After, yes.

"Q. Did you say anything to any officer about that? A. No, sir.

"Q. Did you ever hear the chief cook tell the officer about it? A. No, sir.

"Q. Did you ever see him spit blood after? A. Just that one time.

"Q. Lustgarten wasn't unconscious at the time you saw him? A. Not what you really call unconscious, but he didn't have anything to say.

"Q. You didn't carry Lustgarten to the hospital? A. No, sir, I just got there right after.

"Q. I believe you testified in the direct examination that his complexion is not the same as when he was aboard that might be due to the fact that he hasn't been to sea recently? A. I couldn't say.

"Q. It is quite conceivable though? A. I don't know.

"Q. You testified that way more to-day than at sea? A. No, more at sea than he does to-day.

"Q. Of course, this was more than a year ago and you are just making a guess? A. No, I can see by his general appearance.

"Q. Did you ever see anybody give Lustgarten any medical treatment? A. I believe the second mate, Abbott, did.

"Q. He did go and give him some treatment? A. Yes.

189 "Q. Did you have any conversation with him after the time you saw him in the hospital? A. I used to see him fairly regular.

"Q. Did he ever say anything to you about a broken finger? A. No, sir.

"Q. You don't know how deeply loaded that ship was, do you; that is, about her marks? A. Right down to her marks.

"Q. How much below was she going to England? A. That I would never know.

"Q. Well, in your experience, is it more difficult to steer a ship loaded down in heavy weather than if she wasn't loaded so deeply? A. Yes; worse when she is heavier.

"Q. That might account for the more difficult steering coming back than going over? A. Yes.

"Q. Did you look in the lazarette every day? A. Yes; that was part of our job.

"Q. Did you personally? A. Yes.

"Q. Every day? A. Yes.

"Q. To whom did you report? A. To the officer on watch.

"Q. What watch did you make your inspection? A. 12 to 4.

"Q. And you reported to the officer? A. Yes.

"Q. Always the same officer? A. Yes.

"Q. Who was it? A. Abbott.

"Q. You told Abbott that there was 6′ of water in the lazarette? A. Yes.

"Q. Every day? A. Yes.

"Q. Didn't it become worse just prior to the time you turned around and went to the Azores? A. Not noticeably.

"Q. Of course, a ship in high seas pitches and rolls? A. Not always.

"Q. When ship will have sort of corkscrew motion? A. Not that, mostly pitching, but she will move over a bit and then back.

190 "Q. She will? A. Yes.

"Q. You had some less severe weather on some days than on others? A. Yes; but not much.

"Q. There were days when water wasn't even over forward deck? A. Not much.

"Q. You said that sort of got the ship trim at sea? A. Seemed that way.

"Q. Sort of even keel, is that it? A. Yes.

"Q. You didn't yourself have any trouble with her steering? A. Always had trouble.

"Q. You had to watch it? A. Well, within point and half.

"Q. How many degrees is that? A. 16°.

"Q. That would be natural consequence of ship coming over with seas striking it? A. What do you mean?

"Q. It would be natural consequence that ship would come over when she was riding big sea? A. Just become unmanageable.

"Q. That is consequence of deep seas and heavy loading, isn't that true? A. Pretty hard to manage; just wouldn't stay there, that's all.

"Q. At the time you talked with Lustgarten after the time you saw him in the hospital did you see any marks or bruises on his shoulders or back? A. Never saw him stripped.

"Q. Any other marks? A. Only swelling over left ear to right ear, looked liks toothache.

"Q. Like a toothache? A. Yes.

"Q. That is only mark? A. Yes.

"Q. I take it you had opportunity to see him and were standing face to face with him? A. Yes.

"Q. Did he complain to you at any time that he had anything in his eye? A. Not that I remember.

"Q. Ever see him wiping ashes out of his eye? A. No."

191 WILLIAM TYBURSKI, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation? A. Seaman.

Q. How old are you? A. Twenty-four.

Q. Where were you born? A. In Massachusets—Chicopee, Massachusetts.

Q. How long have you been going to sea? A. About five years.

Q. Were you a member of the crew of the "Coelleda"? A. Yes.

Q. Where did you join her, and when? A. I joined her in Baltimore.

Q. Did you make one or more trips on her? A. I made two trips on her.

Q. Did you know Lustgarten, the plaintiff sitting over here [indicating]? A. Yes, sir.

Q. Which trip, as to your voyages, was he on? A. The second trip.

Q. Did you ever see him before that time? A. No, sir.

Q. Describe his physical condition when you first saw him, that you recall, on the ship? A. When I first seen him on the ship in Baltimore, he joined her.

Q. How did he look at that time? A. He was in perfect condition, just as good as I am now.

Mr. LANDIS. I move to strike out that answer. Let him describe the man's physical appearance.

Q. Well, how big was he, and how much did he weigh, in
192 your estimate? Did you ever see him with his clothes off before the time that he got hurt? A. The only time I seen him with his clothes off was during the trip, whenever he took a bath.

Q. Did you ever see him before the accident? A. Yes, sir.

Q. Describe his physical condition, as to the muscles and build and appearance, as to strength, weight, and so forth, prior to the 5th of March, 1926. A. Well, when I see him I seen nothing the matter with him; he looked healthy.

Q. How about his color? A. He was not as pale as he is now; he had a reddish color more to him, more reddish tint to his face, more red color to his cheeks, and everything all the way round.

Q. How about the fullness of his cheeks and flesh? A. It was more full at the time, more solid.

Q. How about his weight now and his weight then? A. That is hard for me to say, but I believe he weighed more at the time than he does now.

Q. Did you see this accident? A. Yes, sir.

Q. I beg your pardon? A. Yes, sir.

Q. Where were you at the time? A. I was just outside of the galley, in the passageway, about 10 foot away from where the accident occurred.

Q. What watch were you on? A. On the 12 to 4 watch.

Q. That is, you worked from 12 to 4 that day? A. Yes, sir.

Q. And from 12 to 4 the next morning? A. Yes, sir.

Q. And you were off duty then from 4——A. (Interposing.) Until 12.

Q. Until 12. When did this accident occur? A. It happened some time during the day. I do not just exactly recall it. I could not say.

193 Q. Well, what did you see at the time? A. Well, I was standing over there talking to a couple of men, outside of the galley, and all of a sudden I felt the ship give a lurch like, and then kind of spray seemed to come around me, so I looked around and seen Lustgarten with the can he was carrying at the time. The

can was gone and Lustgarten was just laying off the rail, slipping on to the deck.

Q. What did you do? A. So I went over there with another man; went over there and helped him to his room.

Q. What was his condition? A. Well, when I picked him up there was blood coming out of his mouth and nose, and it was streaming down him.

Q. What did you do with him? A. I took him to his room.

Q. And did you see him after that? A. I seen him later after that; yes, sir; the next day.

Q. Did he receive any attention from any of the officers after that? A. I could not say, sir, because after I brought him in the room I stepped out and went outside into the forecastle.

Q. How was the weather that day? A. It was a rough sea.

Q. How was it at the time you left your watch at four o'clock? A. She was rough that day and she was——

Q. (Interposing.) In the afternoon? A. In the afternoon she was bad. She was the same pretty near day in and day out.

Q. How did she steer? A. She steered very bad, sir.

Q. Well, describe it. Imagine yourself upon the bridge with the wheel in front of you; tell us how the wind was hitting and how the seas looked, and how the ship steered, how she acted to the helm at that time, when you left the watch at four o'clock, before this accident.

194 Mr. LANDIS. If your Honor please, I am going to object to this on the ground it is immaterial.

The COURT. How many other witnesses have you got, Mr. Axtell?

Mr. AXTELL. Just one.

The COURT. Did he see the accident?

Mr. AXTELL. The other witness? No.

The COURT. Then I will sustain the objection.

Q. Do you know how she was heading at the time of the accident? A. What do you mean by that, sir?

Q. Her direction. Well, I will say this: Do you know how she was heading as to the wind at the time of the accident? A. Well, the wind was from about the northwest, I believe, and she was hitting a little over to starboard; about a point off the starboard bow.

Q. Which side did this accident occur on? A. The accident occurred on the port bow—the port side.

Q. Would that ordinarily be the lee side? A. It would be the lee side.

Q. If she was steadying off the course? A. If she was steadying?

Q. Where did the sea come from, fore or aft? A. It came from the fore part of the ship.

Mr. LANDIS. I would like to know if he saw this sea. All he said is that he saw some spray, and saw it after it came over.

The COURT. Is that all you saw, some spray?

195 The WITNESS. No; the spray hit me. That is what I felt when I was out by the galley. You see, I was not actually looking at the man when he was dumping the ashes.

The COURT. Is that the only wave you saw, the spray of which hit you?

The WITNESS. No, I seen the water on the deck. If the spray could hit me, there was a lot come over the deck at that time.

The COURT. You did not see any?

The WITNESS. No, I did not, but later in the day I noticed the sea used to come over the well decks there.

The COURT. You did not see any wave hit Lustgarten?

The WITNESS. I did not actually see the wave hit him; no, sir.

Q. What was the condition of his clothing when you carried him in? A. His clothes were wet.

Q. Did you see water on the after bridge, midship deck, at the time of the accident? A. Yes, sir; there was water there.

Q. How much water? A. Well, she was right running over the top of the coaming there.

Q. The spray hit you and you ducked, is that it? A. Yes, sir; I ducked right around the galley there.

Q. Then what did you see next? A. Then I seen Lustgarten right on that rail, just slipping off.

Q. Did you see any water at that time? A. Yes, there was water on deck.

Q. How deep was it? A. Well, about six inches or seven inches, right to the coaming.

The COURT. What do you mean by that? Water does not stay on the deck six or seven inches.

196 The WITNESS. You see, there is a coaming comes up right to the rail, and, you see, that water has to go down through——

The COURT. You mean there was some water running down off the deck?

The WITNESS. It was running down.

The COURT. But six inches, the deck was not covered with six inches of water, surely, was it?

The WITNESS. Well, that is only a passageway there.

The COURT. I want to know what you mean. Where was the six inches of water.

The WITNESS. It was right on the deck there.

The COURT. In the scuppers or where?

The WITNESS. Right by the scuppers, but she was not taking it fast enough through the scuppers at the time. You see, right alongside there is a house, right alongside, and the wave that must have come must have hit that house and come around that house, and just dropped down.

The COURT. You did not see any wave.

The WITNESS. No, but it must have been a wave——

The COURT. What you saw was some water in the scuppers; is that it? A. I saw the spray, and it hit me, and I was 10 foot away in the galley.

The COURT. What water did you see on the deck?

The WITNESS. Well, the water was on deck there, the water that come from——

The COURT. Was it six inches deep on deck?

197 The WITNESS. Yes, sir.

The COURT. Where was it on that deck?

The WITNESS. You see, the scuppers is right here, sir [illustrating], and that is the side of the house. The wave must have hit the side of the house, and the water shoots over this way, you see, and this coaming is about six inches, and it goes right over it. I was here towards the galley [illustrating].

Q. Will you show the jury, Mr. Witness, where you saw the water, using Exhibit No. 5 to illustrate. A. You see, this is the outside of the house over there, and this is the passageway. I was over right here at the house, the galley, and the water must have hit on that side and came this way, and hit this way and dropped over there. That is where she was about six inches high.

Q. All right. A. You see, the scuppers was not taking it fast enough.

Q. Was there any ash chute at that place, at the port side, where you saw this boy at the time of the accident? A. No, sir; there was not.

Q. Had there been any ash chute during the trip, that you know of? A. Not that trip; no, sir.

Q. Had they had any other on any other trip? A. The day before they had one up, and they took it down again.

Q. What kind of an ash chute was it? A. It was a steel ash chute, or an iron one.

Q. Will you tell the jury how it was secured to the deck of the ship, using this photograph to illustrate [handing witness]? A. She was secured right here. The ash chute was held with a bolt

198 down here, and the ash chute rests right on here, and the ash chute was between this rail. It is between two rails.

Q. The bottom of it was bolted, with five bolts, and it was secured by hooks over that rail; is that correct? A. Yes.

Q. How thick was the metal of that chute? A. Oh, I don't know; about half an inch of it.

Q. Well, was it a heavy ash chute? A. It was kind of a heavy ash chute.

Q. A heavy contrivance. Have you seen other ash chutes on other vessels? A. Yes, sir.

Q. Do you know from your experience whether they are in general use as part of the equipment and appurtenances of a steam vessel?

Mr. LANDIS. If your honor please, I object to that as immaterial.

The COURT. You have not shown that they had an ash chute on those vessels.

Mr. AXTELL. It is shown that they did not have it up.

The COURT. You do not mean to contend seriously that a ship carries that thing all the time?

Mr. AXTELL. Absolutely.

The COURT. I will have to see some evidence of that. I will take the testimony.

Mr. AXTELL. The only time that they do not use it is when they are in port.

The COURT. You put in the testimony first before I will take that.

The WITNESS. Pardon me, your honor, could I say something on that?

The COURT. No; you may not. You will answer the questions.

199 Q. Did you see this boy after the time that you left him in the hospital during the trip? A. During the trip I seen him; yes, sir, off and on. I used to go along and see how he was making out.

Q. What was his condition? A. Well, when I seen him a few times there he used to be always kind of bad breathing and kind of choking and spitting out, and when he spit out he would spit out blood, like.

The COURT. Isn't this cumulative?

Mr. AXTELL. They claim that this man is a malinginer and a faker. That is their whole defense.

The COURT. Until they dispute it I will not take it, and will give you an exception.

Q. Did you notice his condition after he left the ship, as to his weight, or at the time he left the vessel at the Azores, his general appearance then and before the accident? A. Well, when he left the ship in the Azores I was in the forecastle, sir.

Q. What? A. I was in the forecastle when he left at the Azores.

Mr. AXTELL. Your witness.

Cross-examination by Mr. LANDIS:

Q. Your testimony has be'n taken by deposition, has it not, in this same matter, before? A. Yes, sir.

Q. It was taken by Mr. Axtell at his office? A. Yes, sir.

Q. And the date when that deposition was taken was in September, 1926, is that true—approximately that time, last fall? A. May be.

200 Q. Where exactly were you standing at the time that this accident is supposed to have occurred? A. I was standing right outside the galley. About 10 foot away from where he was.

Q. Were you standing there at the time that he brought this ash pail out from the galley? A. Yes, he was driving it along the deck.

Q. Did he pass you in the course of that passage? A. Yes, sir.

Q. He did? A. He did.

Q. Unfortunately, you did not hear Mr. Lustgarten testify yesterday that he did not pass anybody on his way there.

The COURT. That comment is unnecessary. Put the next question.

Q. What passageway is it; was it the passageway running fore and aft that you were standing in, or athwartships? A. The one

running fore and aft. I was right at the break of the one running athwartships.

Q. Then you were inside the superstructure, inside the house, were you not? A. No, I was right on the corner of the one running athwartships, and the one running fore and aft.

Q. You testified when your deposition was taken that you were in the passageway running fore and aft. A. Well, I could be a foot either way.

Q. You were inside, were you not? A. I could not exactly say.

Q. How wide is that passageway, do you know, running fore and aft? A. I don't know, about four or five feet.

Q. It is about three feet, is it not? A. Oh, I mean the width.

Q. About three feet, isn't it? A. No, it is about four or five feet. It might be.

201 Q. You could not seen from where you were standing, inside that passageway, what was taking place at the corner of the house, the edge of the ship, could you? A. I could see.

Q. How could you? The house was in the way, was it not? A. It was not. I was at the break of the athwartships passageway and the one running fore and aft, right at the break.

Q. Why didn't you state that when you testified before? A. I did. I was standing right there.

Q. You stated you were standing in the passageway fore and aft? A. Well, I can be a foot either way there. I can be standing in that one and can still see around the corner.

The COURT. The question is where you were standing, and why you say you were standing where you did say you were standing—how you could be where you were.

The WITNESS. That is right where I was.

Q. That is inside the house, is it not? A. It is not. I was at the break of it. I might have been a foot or two inside of it. Show me a true picture.

Q. [Indicating to witness.] This is the house, isn't it? A. That is it right there. There is the galley and there is the house, and I was standing right there [indicating]. I was right at the break of it, right here. That is about 4 or 5 feet wide.

Q. You were not outside in the passageway athwartships, were you? A. No; I was not outside of it; no. I was at the break of it.

Q. The mess room is between you and where Mr. Lustgarten dumped the ashes? A. The galley is a little further than this room here, out.

202 Q. That passageway athwartships is an even passageway all the way across, is it not? A. Yes.

Q. Is that a picture of that section of the "Coelleda" [handing witness]? A. That is the outside section.

Q. That is the outside passageway, isn't it? A. No; that is not a passageway. That is outside of the ship. The passageway is inside.

Q. Yes; I know, but this is where Lustgarten was dumping ashes, isn't it; this is the after end of the amidship house, isn't it [indicating]? A. That is the starboard side.

Mr. AXTELL. I object on the ground that he is questioning the witness about some things that are not in evidence.

The COURT. Objection overruled.

The WITNESS. That is not the port side of the ship.

Q. You do not know what side it is. This is the after end [indicating]. A. This is the after end, and that must be the starboard side of the ship.

Q. You do not know anything about photography. You know that the opposite side of the picture is necessarily the opposite side from the way the eye visages it. Be that the starboard or port side does not matter. This is the after end of the amidship house, isn't it [indicating]? A. I know, but that is the starboard side.

Q. Well, let it be the starboard side; it is the after end of the amidship house, answer the question yes or no. A. Yes.

Mr. LANDIS. I offer this picture in evidence.

The WITNESS. That is a side view [indicating].

The COURT. What do you offer it for? It does not represent the scene of the accident according to the testimony of this witness.

Mr. LANDIS. It is the after end of the amidship house, your honor.

The WITNESS. It is the side of the house.

The COURT. It is the other side of the house.

The WITNESS. That is the outside of the house.

Q. You said the galley stood out further than the mess room? A. That is the opposite side.

The COURT. We do not care what you may think about it; that does not make the paper admissible. You asked the witness a question to contradict him, on the theory that you are right and he is wrong. Now go on with your next question, please.

Mr. LANDIS. This is the picture that he says is the starboard side of the ship [handing counsel].

The COURT. Please go on with the proof; you are simply wasting time talking together.

Q. Who assisted you to take Lustgarten to his cabin? A. What is that?

Q. Who assisted you to take Lustgarten to his cabin? Well, at the time I gave testimony I figured it was Graff; I may have been mistaken.

Q. Graff's deposition has since been taken and he denies carrying Lustgarten to his cabin; is that it? A. He denied that it was so, so it must not have been him, but I figured it must have been him. It was somebody.

Q. You and Graff stood the same watch, did you not? A. Yes, sir.

Q. You knew Graff very well? A. I knew him as a watch mate; yes, sir.

Q. Is it like Graff to say that he did not help to take him to the room if he did? A. Yes, I know, but I can not remember things that happened, seven or eight months later.

Mr. LANDIS. May, I reserve a little time for further cross examination, your honor, depending upon what they develop here?

The COURT. Finish your cross-examination. We will never get done.

Mr. AXTELL. I want to ask a question about the loading of the ship.

The COURT. I am going to stop this trial. Go ahead.

Mr. AXTELL. There is one question:

Redirect examination by Mr. AXTELL:

Q. Mr. Tyburski, did you notice the Plimsoll mark on this vessel? A. Yes.

Q. Describe the appearance of the Plimsoll mark.

The COURT. No; I have ruled on that. It is immaterial. Unless you want to prove something else, as to where this accident happened, I will deny that.

Mr. AXTELL. I want to prove its loading.

The COURT. I have ruled on that.

Mr. AXTELL. I will ask this one question for the record, and that will cover it.

205 Q. Did you see the Plimsoll mark, whether it was above or below the waterline at the time the vessel left port at Swansea?

Mr. LANDIS. I object to the question.

The COURT. Objection sustained.

Mr. AXTELL. Exception.

The COURT. Unless there is further proof as to the happenings of the accident.

Mr. LANDIS. Just a couple more questions.

Recross-examination by Mr. LANDIS:

Q. You were not standing in the passageway in the after end, were you? A. I was standing in the passageway.

Q. Answer my questions. You were not standing out there, were you? A. No, sir.

Q. You were standing inside the house, weren't you? A. Yes, sir, about a foot inside of the house.

RUDOLPH TOMAZIN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation? A. Seaman.

Q. How old are you? A. Twenty-two.

Q. Where were you born? A. Ohio.

Q. How long have you been going to sea? A. Four years.

Q. Were you a member of the crew of the steamship "Coelleda"? A. Yes, sir.

Q. In what capacity? A. Ordinary seaman.

Q. How many trips did you make on her? A. Two.

206 Q. Do you know the plaintiff Lustgarten? A. Yes, sir.

Q. Do you know the last witness Tyburski? A. Yes, sir.

Q. Did you see the accident to Lustgarten? A. No, sir.

Q. Did you see him on the day of the accident? A. Yes, sir.

The COURT. Is this merely as to the position?

Mr. AXTELL. As to the treatment. This man was in the hospital.

The COURT. He was there?

Mr. AXTELL. Yes.

The COURT. Confine it to that for the present.

Q. Were you in the hospital when he was brought in? A. Yes, sir.

Q. Do you remember who brought him into the hospital? A. As far as I could remember the second mate brought him in that night.

Q. You saw him there, did you, with the second mate? A. Yes, sir.

Q. Describe his condition? A. As far as I could see, blisters on his back, a cut over his head, swelled up over his left eye, if I am not mistaken, and he was coughing up blood.

Q. Was he conscious or unconscious when you first saw him? A. Conscious when I seen him.

The COURT. Do you mean that he was coughing up blood in the presence of the captain?

The WITNESS. The captain was not there.

The COURT. How?

The WITNESS. The captain was not there.

207 Q. The second officer was there, was he? A. He was; yes, sir.

Q. What did the second officer do for him? A. All they give him was a dose of salts and made him comfortable.

Q. Did you ever see the captain in that room with Lustgarten? A. I seen him the next morning.

Q. Tell the jury what took place at that time. A. He told me to go to work, and I was laid up, and I refused to go to work, and they told him to go to work and forced him to go to work.

Q. What did you hear said between the captain and Lustgarten? A. Well, he told him, he says, "The other man ain't able to go to work," he says, "You better turn to," and helped him out the doorway.

Q. He helped him out the doorway? A. Yes, sir.

Q. Did he take hold of him? A. Just took him by the hand and says, "You better turn to."

Q. Did he make any examination of Lustgarten before that, to find out what his condition was? A. Not that I know of.

Q. Did he ask him any questions? A. Well, he asked him what was wrong, asked him if he was hurt. He says he was not hurt at all.

Q. What is that? A. He asked him if he was hurt; he said yes, and the old man, the captain, said he was not hurt at all.

Q. Did he make any examination to find out if he was hurt—any examination? A. Not that I know of.

Q. What was said by the captain and Lustgarten at that time? A. Lustgarten told him he was hurt.

Q. What did Lustgarten say? A. Told him he was dumping the ash can over when the spray came up and hit him.

208 Mr. LANDIS. Your honor, this is not material.

The COURT. Objection overruled. This was in the presence of the captain?

The WITNESS. Yes.

Q. Go right ahead and finish it. A. Well, he told him he was hurt, a spray came over and hit him, and the captain told him—he did not believe it, he says, "You better go to work," he says, "We are too many men short now."

The COURT. Is that all he said to the captain?

The WITNESS. Yes, sir; that he was not able to work.

Q. What did the captain do then? A. Why, helped him out the doorway and told him he better turn to.

Q. How long was the captain in the room? A. I do not think he was in it over five minutes.

Q. Was Lustgarten dressed or not dressed when he came in? A. Sir?

Q. Was Lustgarten dressed or not when the captain came in? A. Well, as far as I know he was laying in bed at the time.

Q. Do you remember whether he had his clothes on or not? A. I could not tell you.

Q. Do you remember whether any clothes were provided for him by the captain? A. No, sir.

Q. You do not recall? A. No, sir.

Mr. AXTELL. That is all.

Mr. LANDIS. No cross-examination.

209 ARTHUR J. HENRIQUES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation? A. Marine surveyor.

Q. Will you state your experience as a navigator and marine and shipbuilder, and marine surveyor? A. About thirty years' experience at sea in all the grades, and most all classes of ships, to master. For the last four years I have been practicing as a marine surveyor in New York.

Q. Have you been associated with the defendant in this case? A. No, sir.

Q. I say have you been?

Mr. LANDIS. If your honor please, I object.

Q. Employed by the defendant in this case? A. No, sir.

Mr. LANDIS. I object to it as immaterial.

The COURT. He says no.

Q. I do not mean in this case, but I mean have you been employed, in the general employ of the Emergency Fleet Corporation? A. Yes, sir; I have been.

Q. In what capacity? A. Surveyor.

Q. For how long a period? A. About a year.

Q. What are your duties as a marine surveyor? A. To go aboard the ship and survey, make a survey and examine where accidents have happened and damage to the ship itself.

Q. Are you familiar with shipbuilding, designing, and repairing? A. In a way; yes, sir.

210 Q. Are you familiar with the customs and the practices of equipping ships? A. Yes, sir.

Q. For navigation? A. Yes, sir.

Q. Are you familiar with a vessel known as the "Coelleda," Hog Island type? A. Not that particular type. Of that type.

Q. Have you a photographic reproduction of a Hog Island type of vessel of which the "Coelleda" is one, in your pocket? A. Yes, sir.

Q. Is this the picture of the vessel [indicating]? A. That is the picture of that type, published by the Shipping Board.

Q. And these are the plans [indicating to witness]? A. Yes, sir.

Q. Of that ship or that type of ship, of which there were some 40 or 50 built? A. Yes, sir.

Q. Her name appears on this list, does it? A. Yes, sir.

Q. This is published by the Shipping Board or the Fleet Corporation at Washington, as an official document with relation to the sales of such vessels to the public? A. Yes, sir.

Mr. AXTELL. I offer this in evidence to illustrate the ship. Is there any objection?

Mr. LANDIS. Yes; I object to everything but the picture. I do not object to the picture going in.

Mr. AXTELL. I offer the whole thing, which has the plans attached, to show the general structure, design, and measurements.

The COURT. Objection sustained.

Mr. AXTELL. Counsel has no objection to the photograph.

Mr. LANDIS. No; I won't object to that going in.

11 Mr. AXTELL. Then I will ask counsel to produce the original plans of this vessel which we have subpœnaed.

(Mr. Landis hands Mr. Axtell plans.)

(Picture marked "Exhibit No. 10 for Identification.")

Mr. AXTELL. These plans we have here in blue print are the same, are they not, captain, as this smaller and more convenient issue which we have just offered in evidence?

The COURT. What do you intend to prove by this witness?

Mr. AXTELL. I want these plans—well, by the witness I want to prove the custom and the practice of ash chutes, particular on these ships, as part of the regular equipment.

The COURT. Go ahead with that.

Q. Captain, do you know whether there is any general custom or practice of equipping vessel with ash or garbage chutes for use of the galleys? A. Yes, sir.

Q. Is there any such custom or practice? A. Yes, sir.

Q. Please state what the custom is. A. Ships are equipped with the ash chute, usually made of iron, that fits into the rail and extends over the rail for a short distance, at an angle of about 45 degrees, for the purpose of disposing of ashes or garbage, as the case may be.

Q. And when are those chutes used, captain? A. At sea.

Q. Are there any times in the navigation of the vessel when these chutes are not used? A. They are not used in port.

212 Q. Why not? A. Violate the ordinance, dumping garbage or ashes overboard.

Q. In the harbor? A. In the harbors or alongside the dock.

Q. And is that the only time they are not used? A. It is; yes, sir.

The COURT. What do you mean by that, captain? Do you mean to say that in the navigation of the ship you think it would be unseaworthy practice to take them in?

The WITNESS. To take them in at sea?

The COURT. Yes.

The WITNESS. It is not the custom to take them in at sea.

The COURT. I ask you whether you consider it unseaworthy in the navigation of the ship, to take those chutes in at sea, under very heavy conditions of weather?

The WITNESS. They have never been known to be taken in for heavy weather.

The COURT. What is to prevent their being washed away?

The WITNESS. They are secured to the rail of the ship in such a way that they virtually become part of the ship.

The COURT. They stick out beyond the side of the ship, do they not?

The WITNESS. Yes, sir; over the edge of the ship, and to that they customarily have a canvas chute that goes around, so as to carry the garbage and ashes down to the water's edge. It is mostly canvas.

Q. Look at this photograph, Exhibit No. 3, and at Exhibit No. 5. Can you state what those poles are for, and that plate against

213 the rail, on that vessel, the "Coelleda," of which that is a photograph [handing witness]? A. It appears to be a bracket for a chute.

Q. And what kind of a chute? A. Ash or garbage or——

Q. (Interposing.) Looking at Exhibit No. 3, are you familiar with that construction in Hog Island vessels, that little scupper outside of the shall line of the amidship structure of the ship? A. Yes, sir.

Q. Is that a common design to other vessels, or is it peculiar to the Hog Island vessels?

Mr. LANDIS. If your honor please, I object to that on the ground that it is immaterial.

The COURT. I do not see its materiality.

Mr. AXTELL. I am trying to show the necessary in this instance for having the chute at all times erected, if they are going to dump ashes from the after end of the ship's structure. That is my purpose in the question.

The COURT. Read the question.

(The question was read by the stenographer.)

The COURT. Objection sustained.

Q. In your opinion would it be necessary for the safety of the crew in dumping ashes to maintain the ash chute permanently on the side of the vessel at all times while at sea, especially in rough weather? A. Yes, sir.

Q. I am assuming and I am referring in my question to the ship designed as that photograph illustrates this ship was designed. Are you bearing that in mind? A. Yes, sir.

Q. Will you illustrate to the jury, and step down, if the court has no objection, just how the *the* ash chute would come out of the
214 side of the vessel, by the use of those photographs—that is, illustrating with the use of that photograph? A. I can not, because it does not show the side of the vessel longitudinally. It shows it athwartships and I can not sketch on that.

Q. This photograph, Exhibit No. 3, is looking longitudinally. A. This chute is on the rail, like this, and would extend over at an angle of 45 degrees.

Q. And where would it come to? A. [Witness indicates on exhibit.]

Q. You mean it would be attached to the rail back here, would it? A. There is no rail here at all. There is no rail on this picture.

Q. Then take Exhibit No. 5 for illustration. Assuming that that is on the outer edge or shell of the ship—— A. (Interposing.) Then the chute would come right on top of that, come like this, and then extend out over the rail like that, at an angle of 45 degrees.

Q. It goes up, to the rail, so the man could dump the ashes in conveniently from the deck? A. Yes, just about the height of the top of the bucket or a little less.

Q. Are you able from the plans of this ship which you have examined to give the jury an estimate of the number of tons of water in her lazarette hatch, above her fresh-water hatch, when she had six feet of water in her? A. No, sir.

The COURT. Why go into that? I have ruled on it time and again.

Mr. AXTELL. I know your honor sustains the objection. I want an exception. That is all; your witness.

215 Cross-examination by Mr. LANDIS:

Q. These ash chutes are primarily to keep the ship's side clean, rather than as a safety device, are they not? A. They are both.

Q. They are primarily to keep the ship's side clean, are they not? A. Primarily, yes.

Q. As a safety device, they may or may not be under certain circumstances. How high above the deck does this ash chute stand? A. Oh, I would say something under three feet.

Q. It would extend as high as that second rail, would it not? A. About 30 inches, I would think.

Q. Doesn't it extend as high as the second rail? A. The second rail would not be in place at that particular spot. It is a chain rail, so I am informed, in this case.

Q. It is not according to these pictures. Here is plaintiff's Exhibit No. 4, and it is a pipe rail shown there [indicating]. A. That is the same thing, yes. I don't know that there is any rail there at all. That is on the side of the house. That is bolted on the side of the house.

Q. And how far in from the side of the vessel is that ash chute? A. I should say about 12 inches.

Q. How many ships have you sailed on, captain? A. Something like 35.

Q. Are you able to state as a matter of fact that every one of those 35 ships were equipped with ash chutes? A. No, because of the 35 there were many various types, and some of them sailing vessels.

Q. Well, of all the steamships you sailed on. A. I can not say just how many steamships I sailed on.

Q. All the steamships that you sailed on, were they all equipped with ash chutes? A. I do not recall one that was not.

216 The COURT. Do you recall one in which the ash chute was constantly in use under all conditions of weather?

The WITNESS. At sea, yes, sir; and where it was a coal-burning ship there is an additional device of a traveller that ran out from the fire door, overhead, in which they have a wheel and a hook, and put the buckets on that and run it out on the rail and swung the bucket.

Mr. AXTELL. It is a question whether it is better to damage the iron than human beings. I do not see the need of the question.

The COURT. You may not see the need of the question, but I am trying to get at the facts. I think that was entirely uncalled for.

Mr. AXTELL. I am sorry, your honor.

Q. Have you ever known an ash chute to be knocked off in heavy weather, knocked off the side of the vessel? A. I do not recall any such instance as that.

Q. You whould not say there had not been occasions when that had happened? A. No.

Q. It is probable that it has happened, is it not? A. Probable, yes.

Q. And it would be more dangerous if the ash chute was knocked off, and the man were dumping ashes, than if it were not there? A. I could not answer that question.

Q. Then when you answered that it was a safety device, as Mr. Axtell asked you—that is, it was necessary for the safety of the men dumping ashes—you did not know what you were talking about, did you? A. I knew what I was talking about, yes.

Q. Can't you answer my last question? A. That is an hypothetical question.

217 The COURT. That is what you are here for.

Q. So was Mr. Axtell's question. It would be more dan-

gerous to have the ash chute there if it were knocked off, than not to have it there, for the man dumping ashes? A. No, I would not say it would.

Q. If the ash chute was knocked off? A. Yes.

Q. By a heavy sea coming over the vessel?

Mr. AXTELL. I object.

The COURT. Objection overruled.

Q. Do you want the jury to understand that if the ash chute were knocked off that the man dumping ashes into the mouth of that ash chute, a heavy steel affair, would be in a less dangerous position? A. Yes.

The COURT. Will you explain that, Captain?

The WITNESS. Why, if the sea came up and washed that ash chute over, it would probably go over the side, and that bucket is inside the rail.

The COURT. Why do you say probably?

The WITNESS. Because most of the weight of the ash chute is over the rail, over the edge of the rail.

The COURT. I thought you told me a moment ago that the only thing that was over the rail was the cloth that was on the end of it.

The WITNESS. No, sir; this ash chute is built oblong in shape, sets on the rail, and then out from it at any angle of 45 degrees, with the chute over the side.

218 The COURT. Does the chute go through, beyond the side of the ship?

The WITNESS. Yes, sir.

The COURT. I thought you said five minutes ago that it did not; I so understood you.

The WITNESS. Well, perhaps I did not fully——

The COURT. If it does protrude from the side of the ship, how far does it protrude?

The WITNESS. Just a short distance.

The COURT. How many feet?

The WITNESS. 14 inches.

The COURT. And how far does the iron structure protrude inside the rail?

The WITNESS. About 12 inches, I should say.

The COURT. Then I understood right along that protruding device is inside the rail.

The WITNESS. Yes.

The COURT. What happens if he is standing forward of that and a wave hits the part of that structure protruding beyond the side of the ship?

The WITNESS. He is standing forward of it, he would be on the weather side of it in that case, and the wave would strike him first before it struck the ash can.

The COURT. The wave may not come inboard at all. I am talking about a wave that strikes the portion of that structure outboard, and the man is standing forward of the inboard portion. What happens to the man?

The WITNESS. He is struck at the same time, but he is clear of the chute.

The COURT. How is he clear of the chute?

219 The WITNESS. He is standing on the deck and the chute is on the rail, and over the rail.

The COURT. You said it extends 14 inches outside.

The WITNESS. It extends 14 inches outside and 12 inches inside as well.

The COURT. Please explain to me what you mean when you say that that is a safety device?

The WITNESS. Because the man does not have to lift the bucket; he can get the edge of the bucket up against the edge of the chute and dump it in.

The COURT. Then the only safety in it is if he attempts to lift something that is too heavy for him to lift; is that all?

The WITNESS. Yes, sir; he has to lift the bucket up to the rail to get it over without the chute.

Q. Of course, a wave coming over the side of the vessel where he was dumping ashes would hit him, regardless of whether he was dumping ashes into the ash chute or not, would it not? A. Yes, sir.

Q. How many Hog Island ships have you actually seen?

The COURT. I do not think you need pursue that.

Mr. LANDIS. All right.

Redirect examination by Mr. AXTELL:

Q. Is it a fact that the ash chute designed for this vessel, to attach to this steel rail, is of a strong, permanent character, such as

220 described by the witness Tyburski—metal half an inch thick? A. Yes, sir; from the photograph.

Q. And it is likely that such a structure as that would be washed off by the seas that went on that deck?

The COURT. On that deck?

Mr. AXTELL. On the deck where it is attached.

Mr. LANDIS. Your honor, this man is not qualified.

The COURT. It does not cover the point. The seas do not strike on the deck at all. The idea of sticking a structure of that kind out into the ocean—it ought to be explained.

Mr. AXTELL. The pictures explain it, if your honor will let me show you. There are the holes for it right there through that thing, botled on half-inch metal. It extends barely over the edge, and carries it over this scupper. How is the man going to get from that rail to the side? If the permanent part of the ship that belongs there were there, this accident would not have happened. That is perfectly clear to me.

(Witness excused.)

Dr. WILLIAM M. CARHART, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation, Doctor? A. I am a specialist in the eye and ear.

221 Q. Are you a licensed physician and surgeon in this city? A. I am.

Q. How long have you been practicing? A. Since 1891.

Q. Are you connected with any hospitals at the present time? A. I am in charge of one of the clinics of the department of health children's eye service in the Bureau of Child Hygiene. I was twenty years connected with the Manhattan Eye, Ear, and Throat Hospital as assistant attending surgeon, and I am consulting oculist to the Peekskill Hospital up the river.

Q. Have you examined at my request this man Benjamin Lustgarten? A. I have, three times.

Q. When did you first see him? A. On the 10th of this last May.

Q. When did you last see him? A. On the 3rd of this month, June.

Q. You mean you saw him in May, 1926? A. No; May, 1927. I have no record of having seen him in 1926.

Q. Will you describe him, please, at the time when you first examined him. A. I examined his eyes subjectively for vision and objectively for the cause of the loss of sight. He had only perception of light in the right eye, and there was practically no field of vision—what I mean by that is that he merely saw the light but could not place the direction of the light when it was flashed into his eye from the side or from the front. In the left eye he had twenty-two one-hundredths vision, which is about a fifth of vision. He had a great deal of photophobia or drift light because—I found that out by flashing light from the side into the eye, and he evidently was not only pained by it but he shrank from it. Objectively in the right eye there was a brownish discoloration or scar

222 on the white of the eye, about half way from the margin of the cornea to the outer angle of the right eye. Apparently there had been—do you want me to go and say—well, I will go ahead. Apparently there had been an injury there which had destroyed the integrity of the covering of the eye at that spot, and apparently some of the inner coating of the eye had protruded, causing the discoloration. Then looking into the eye with the ophthalmoscope I saw that there was beginning optic atrophy—that is, that the optic disc was paler than it had been. On one edge it was swollen as if he had had an optic neuritis from which he was gradually recovering. All over that eye and over the other eye there were brownish spots of a neuroretinitis over the whole extent of the retina of each eye. There was no change in transparency of the lens in either eye, so I could see clearly the condition of the back part.

The COURT. Will you come to the cause of this?

The WITNESS. Yes; in my estimation——

The COURT. Just a moment. Will you ask the hypothetical question?

Q. Doctor, is this condition permanent or not permanent? A. Absolutely permanent and progressive.

Q. And what degree of blindness do you find that the men is suffering in either eye at the present time? A. He is practically entirely blind in the right eye and will be entirely blind some time in the future in the left eye.

Q. Assuming that this man could see from both eyes well enough to wear glasses and could pass an examination for a able seaman's certificate prior to March 5, 1926, and that on that date, being
223 in good health, having had no serious injury or illness except the fracture of the elbow or some other injury of that character; that on that date he was struck by an ash can, or carried by a sea against the rail and his head was injured and he was knocked unconscious, and he had a bruise on his forehead above the right eye; that his right eye was inflamed, that his face and jaw were swollen, that he was spitting blood; that he was on the ship in the hospital over night and the next day required to go to work; that he worked for a short time and then was relieved from duty and then left on the ship until she arrived at the Azore Islands some seven or eight days later, possibly; that he was taken off the ship and put under the care of a doctor in a hospital, and then brought him home to the United States on another vessel, when he entered the Marine Hospital and stayed for a period of three or four weeks, and has been treated in various hospitals by various doctors since then,—in the condition you found him on the days you have stated, can you state with reasonable certainty whether or not such injury or blow as I have described it might have been or was the competent producing cause of the blindness that you find that he now suffers from? A. It may have been, and was, in my estimation.

Q. Is treatment after such an injury or relief from work of any importance in the matter of treatment? A. None at all.

Q. I mean to say——

Mr. LANDIS. If your honor please, I am going to object to this.

The COURT. Do you object to that last question?

Mr. LANDIS. No.

224 Q. The question I want you to answer is this: Would requiring a man to work after such an accident improve or make worse his condition?

Mr. LANDIS. I object to the question on the ground it has already been answered and in view of the fact that in any event the time that the plaintiff was required to work is not shown.

The COURT. Objection sustained.

Mr. AXTELL. Exception. That is all.

Cross-examination by Mr. LANDIS:

Q. Doctor, why did you say that in your opinion it not only might have been but was the cause of this trouble. You do not know whether this accident happened or not, do you?

The COURT. I shall instruct the jury to disregard this testimony as to the condition of his eye.

Mr. AXTELL. Disregard all the testimony?

The COURT. As to the condition of his eye. You may have an exception.

Mr. AXTELL. I did not get it.

The COURT. As to the condition of his eye, that question will be excluded.

Mr. AXTELL. The condition of his eye now?

The COURT. You may proceed, Mr. Axtell. You may take your exception and proceed, please.

Mr. AXTELL. In justice to my client I can not proceed without understanding your honor's ruling.

The COURT. I say I shall instruct the jury to disregard the testimony of this witness. Now you may proceed. I do not think
225 that any right to recover for that condition has been established. I understand from counsel that no further testimony is to be offered on the question of liability. That is the basis of the statement.

Mr. AXTELL. I see. That is all.

(Witness excused.)

Dr. WILLIAM T. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation, Doctor? A. Physician.

Q. How long have you been practicing? A. Over 25 years.

Q. Have you specialized in any particular branches? A. I practice general medicine, specializing in diseases of the eye.

Q. Have you had experience with tuberculosis? A. Yes.

Q. And have you made certain X ray examinations and other examinations of the plaintiff Lustgarten, with a view to determining whether or not he was suffering from that disease? A. Yes, I have.

Q. What times have you examined him, and what have you done with a view to ascertaining his condition? A. I examined him first on April 6th, 1926, and again on January 28th, 1927, and again on June 2nd, 1927. I made a general physical examination of his chest—that is, listening with a stethoscope, by percussion and sounding of the chest, observation of his breathing, and I took
226 X rays of his chest; also examined with a fluoroscope, which is another means of X ray examination by vision.

Q. Well, what did you find on the first occasion? A. On the first occasion I found moist rales in the upper parts of both lungs—that is, in the extreme upper part of both and the middle portion of the right lung. I did not at that time find any distinctive evidence of

tuberculosis, but later on January 28th, 1927, I found additional rales spread further over both lungs, and by X ray examination I found—well, not in January. In January, 1927, I found a further—an infiltration in the lungs, which still was not typical of tuberculosis, but on the last examination of June 2nd, 1927, I found a general diffuse infiltration with certain deposits which were tubercular. He had advanced from a pretubercular state to an advanced tuberculosis on June 2nd.

Q. Is he now in a tubercular condition? A. He is.

Q. Assuming that on the 5th of March, 1926, this young man was in good physical condition and had no previous illness or lung trouble or injury to his lungs, was strong and healthy; that on that date in the afternoon about six or seven he was struck by a sea while dumping ashes over the side of the vessel and washed up and knocked down on the rail and crushed between the heavy ash can and the rail, injuring his ribs and his body in the region of the juncture of the ribs and the abdomen; that he had difficulty in breathing afterwards and suffered a great deal of pain in the chest and lungs, and that on the morning following the accident he was required to get up out of his bunk in the hospital on the ship and go to work, by the
227 master of the vessel, without any previous examination being made to find out his condition; that while thus obeying orders and while kneading bread in the galley a quantity of blood came from his mouth which he could not control, and that some time after that he had been given a large dose of Epsom salts with water, with no other treatment excepting rubbing with vaseline or some liniment; that he was taken off the ship some seven or eight days later and carried to a hospital of the United States, where he received hospital treatment; that he continued and was in the condition that you describe when you first saw him, and subsequently at the dates you have mentioned—can you state with reasonable certainty whether or not the act of the master in requiring him to resume his duties in the galley was or might have been a competent producing cause of the aggravation of his condition that is resulting in tuberculosis? A. I can; yes, sir.

Q. Was such act of the master in requiring him to work in your opinion a competent producing cause of the tuberculosis from which he now suffers? A. Yes· requiring him to work in the condition in which he was following the accident.

Q. Is this condition he now is in permanent or not? A. It is permanent.

Mr. AXTELL. That is all.

Cross-examination by Mr. LANDIS:

Q. Doctor, you do not know much about the condition that he was in after the accident, do you? A. Pardon me?

Q. You do not know much about the condition that he was in following the accident, do you? A. I was assuming.

228 Q. Yes; you were making a wild guess. A. No, I was making no wild guess. The question is assuming the facts that the attorney stated, and I am assuming.

Q. What facts did he state except that the man got wet and got hit by this wave and got struck in the chest against the side of the vessel? A. And all the rest of the facts, having a hemorrhage from the lungs.

Q. When was this hemorrhage? A. The following morning, as I understand the question.

Q. It was when he was working; he had not had the hemorrhage before. Do you mean to say that that man's working for two hours was the cause of this tuberculosis? A. I said in the condition in which he was, that it aggravated——

Q. (Interposing.) Answer the question yes or no, Doctor. A. I can not answer the question yes or no.

Q. Are you a specialist in tuberculosis? A. I do not specialize in it; no.

Q. You are a general practitioner and? A. Yes.

Q. And you practice electrotherapeutics more than anything else, do you not? A. No, sir.

Q. Aren't you in the directory as being a practitioner for electrotherapeutics? A. I am in the directory as being a member of the electrotherapeutics——

The COURT. Ask him the questions and let him answer.

Q. Are you a member of any hospital now? A. I have resigned from several of them. Not now.

Q. Do general practitioners pass upon a man's tuberculosis when you have a case come to you? A. I do not. I do at times.

229 Q. It is generally done by your profession, isn't it? A. Well, any physician is competent to pass on tuberculosis. That belongs to general medicine.

Q. Is that why they have specialists in it, because any physician is competent? A. They have them in doubtful cases, and very often for the satisfaction of the family—sharing the responsibility for causing one to disrupt his whole life for such a serious disease.

Q. Your whole diagnosis of tuberculosis in this man's case is due to these râles? A. Râles?

Q. Râles; whatever you call them. Why, no; I testified I examined him with the fluoroscope; I took X-ray pictures of his chest.

Q. What did the X-ray pictures show? A. I testified to that also.

Q. Then testify to it again. A. The first ones did not show tuberculosis and the last ones did.

Q. What do you mean by showing tuberculosis? A. Showing the condition produced by tuberculosis.

Q. What is that condition? A. Infiltration.

Q. What does infiltration mean? A. Why, an inflammation begins from the tubercle bacillus.

Q. Is there anything else that causes that?

The COURT. Have you motions in this case?

Mr. LANDIS. Yes, I believe so.

The COURT. I will excuse the jury until two o'clock. Is this your last witness?

Mr. AXTELL. Yes, sir.

(At this point the point the jury was excused until two o'clock p. m.)

The COURT. I think the case is complete except for the cross-examination of this witness. If there is no objection of counsel I will hear the motions at this time.

230 Mr. LANDIS. If your honor please, I move to dismiss the complaint in both causes of action, as against both defendants, on the ground that the plaintiff has not made out a cause of action, has not made out a case, inasmuch as he has failed to connect any injury which the plaintiff sustained at that time with any fault on the part of the ship. That is particularly with regard to the first cause of action. With regard to the second cause of action, that on the plaintiff's own admission he was not made to work after the captain realized how ill he was; that he was given the best of medical attention, according to his own statement, and was put off the ship at Punta del Garda to enter the hospital.

The COURT. There was one witness testified this morning that he had hemorrhages before the captain came to his room.

Mr. LANDIS. He testified he did not.

Mr. AXTELL. He said he had blood in his mouth. That his teeth were broken. I did not bring that out.

The COURT. He said he was spitting and vomiting blood, but the captain came there and ordered him to work.

Mr. LANDIS. That same witness admitted he did not know whether he had done that in the captain's presence or not.

The COURT. No; he said he had done it in the other officer's presence.

Mr. LANDIS. No; I do not think he said that.

The COURT. I asked him myself. I asked him if this happened when the captain was there. He said, no; he was not there, the

231 other officer was—Mr. Abbott—that he was spitting blood.

Mr. LANDIS. What happened was as soon as Mr. Abbott found this man was at work, he took this man up on the bridge, and then the captain let him off work and marked him "off" officially.

The COURT. You have a statement from the doctor that this tuberculosis was produced by this accident. I think that is a question of fact.

Mr. LANDIS. How about my first motions? May I renew them?

Mr. AXTELL. Of course, the plaintiff admits, as your honor very quickly saw, that he was blamed here partly, because after he got the order to dump the ashes and after he told the cook to help him, he went and filled this bucket fuller of ashes than it was before, which shows that it was at least partly his fault. I say this equipment, which is a part of the equipment of every vessel and belonged to

every ship just the same as her booms, is essential to her cargo but is just as essential to the crew, and belongs in place when the vessel is at sea, just the same as her lifeboats do. That is the evidence in the case, and that is true. I do not want your honor to feel there is any doubt about that. That is so on every ship. They take them down in harbors because if they are left there the crew regard that as sort of permission.

(A discussion ensued not reported.)

The COURT. I think that it was a mere convenience and not a safety device. What other ground is there?

232 Mr. AXTELL. The ordering by his chief officer to do that work at that time when the seas were rolling as badly as they were. The boy protested—it is true, midly, but that does not make any difference.

(A further discussion ensued not reported.)

The COURT. I will dismiss the first cause of action.

Mr. AXTELL. Exception.

Mr. LANDIS. If your honor pleases, may I renew my motion on the second cause of action, on the ground that there is no proof in this case that the captain had any reason to believe that man was in a serious condition when he suggested that he go to work; and the captain only when he had reason or sufficent reason to know the man was actually ill and suffering excused him. As soon as the captain had an opportunity to find out from the man in charge of that duty aboard that vessel how this man was, he relieved him from duty. He did ask him questions, and Lustgarten's own testimony and the testimony of this witness who was in the same room was that nothing much was said except, "I am sick." The captain had a malingering crew, and it was natural.

The COURT. There is testimony that the other officer came to him when he found him at work and said, "You ought not to be at work," and took him up to the bridge and told him, the captain.

Mr. LANDIS. Yes; but the captain did not know anything about it.

(A discussion ensued not reported.)

233 Mr. LANDIS. There is no evidence that shows any officer had any knowledge of this accident.

The COURT. Whatever that may be, there is very convincing evidence that it happened. As soon as he found this man hurt, he, being a man who had examined him or talked to him, said, "Here, young chap, you should not be at work, you are too sick," and immediately took him to the bridge and told the captain he should not be at work.

Mr. LANDIS. We have got to put on to meet this particular second cause of action about fifteen witnesses. May I move to strike out that part of the second cause of action which alleges medical treatment was refused?

The COURT. The pleading will stand. Whether it is within the four corners of it I do not know.

Mr. AXTELL. I would like to reopen to ask the plaintiff a few questions. I will ask your honor to let me just prove—or perhaps we could agree that fifteen or twenty dollars a week would be a reasonable sum for maintenance and cure during the period of his disability.

(Recess until 2:15 o'clock p. m.)

AFTERNOON SESSION

234 Dr. WILLIAM T. POWER resumed the stand.

Cross-examination by Mr. LANDIS:

Q. Dr. Power, tuberculosis is a bacteria disease, is it not—a germ disease? A. Yes, a germ disease.

Q. Is it contagious? A. Yes.

Q. Are we all carrying germs, tubercular germs? A. That is the opinion, that germs are present in all persons.

Q. Now, will you explain to the jury how an accident can cause tuberculosis in a germ disease? A. Well, as you just said, the germs are present in the mouths and the respiratory passages, the breathing passages of all individuals, but we have a certain resistance to disease. Anything that lowers our resistance or breaks down the general strength and health, is apt—is capable of giving these germs a chance to multiply and overwhelm the individual with the disease.

Q. Do you know the nature of the work plaintiff was doing for the few hours he was working? A. No, I do not.

Q. Doesn't a great deal depend on the nature of the work he was doing, whether or not the work might cause him to have tuberculosis? A. Why, in view of the condition he was in, he should have been in bed. Anything he might have been doing was not beneficial for him.

Q. You have not answered the question. The question is, doesn't a great deal depend upon the nature of the work he was doing, whether or not the work might cause him to have tuberculosis? A. Of course you mean at this particular time, after the accident. Well, I said he should have been in bed. He was not fit to do any work, and the harder the work the more liable it would be to cause damage.

235 Q. The mere fact that he was not in bed is the cause you believe of his having tuberculosis? A. Well, I could not quite put it like that. The mere fact that he was not in bed—but he was in such condition that for his best——

Q. (Interrupting.) That does not answer the question, Doctor. Your answer is no to my question? A. The question is too narrow.

Q. Your answer is no to my question? A. I don't like to say no to the question, but I would have to explain if I answer it at all.

Q. Unfortunately I have the right to confine you to yes or not. Your answer is no? A. What is the question?

Q. The question is, the mere fact that he was not in bed is the cause you believe of his having tuberculosis? A. I don't think that could be fairly answered by yes or no.

Q. Well, then, you refuse to answer? A. Yes, I can not answer that.

Q. Suppose that this witness were up and about that vessel for a period of four or five days on his own accord, at his own desire, that would have contributed to his having tuberculosis? A. Yes.

Q. If he were doing very light work in the galley, the chances are so remote that that could have caused tuberculosis that they are negligible, aren't they? A. I know, in addition to the fact he was up and about, any added exertion would be that much more exposure and weakening.

Q. You have answered my question; that of itself, and not in connection with anything else? A. Light work in the galley itself would not cause tuberculosis: no.

Q. The fact that this accident had occurred and he was
236 doing light work in the galley, would that be the cause of tuberculosis, the light work in the galley, from the accident? A. At one time you put that to contribute to the development of tuberculosis and at another time the cause.

Q. I am asking the question. A. I would not say it would be the cause, but it would contribute. Just a little light work is not a recognized cause of tuberculosis. I don't want to be on record as saying anything like that.

Q. Then you withdraw your statement made on direct examination that his working for two hours in the galley was responsible, in part responsible, for the fact that he has tuberculosis? A. No; I will not withdraw that.

Q. You admit that the fact that he was doing light work, the work in the galley, without your knowing what sort of work he was doing, was not the cause of tuberculosis? A. In a well man, that alone would not be the cause of tuberculosis. But considering this man's condition, it brought on tuberculosis.

Q. Regardless of what work he was doing? A. Yes; the mere fact of his being up and about was against his best interest.

Q. Did you personally take these X rays? A. I did, yes.

Q. On what date? A. These two, Nos. 2438 and 2439, were taken on June 3. I took them.

Q. And did you take these? A. Yes.

Mr. LANDIS. I ask that these be marked in evidence.

(Marked "Defendant's Exhibits B and C.)

The WITNESS. Nos. 2051 and 2052 were taken on April 6, 1926.

Mr. AXTELL. I offer them in evidence.

Mr. LANDIS. I will offer them.

237 (Marked "Defendant's Exhibits D and E.")

Mr. LANDIS. May I proceed?

The COURT. Yes.

Q. Doctor, do these X rays there taken in April, 1926, indicate that the plaintiff had tuberculosis? A. No; they do not.

Q. They do not? A. No.

Q. And you dare say that this plaintiff has tuberculosis today, a year and four months after this accident, without knowing what may have intervened in his life in between—that the cause of his tuberculosis today is that accident. A. I made that statement in answer to a hypothetical question which assumed that nothing else had developed since, or rather that it was a competent producing cause, that is the wording of the question.

Q. It might not have caused it? You admit that? It might have happened otherwise? A. A man might have such an accident and not have tuberculosis; yes.

Q. The tuberculosis that he has at the present time might not have resulted from that accident, is that true. A. As I examined him one month after the accident, and found a condition I then reported to be suspicious, and advised an examination of the sputum, and on further investigation I considered it a pretubercular condition, and subsequent examinations have borne that out.

Q. You have not answered my question? A. What is the question?

Q. The question is, the tuberculosis that he has at the present time might not have resulted from that accident, is that true? A. Why, it is true; yes.

Q. You don't know why he has tuberculosis today, do you?
238 A. Except that I am of the opinion that the sequence of events gives this diagnosis.

Q. Yes; but you don't know what has happened in between or anything else, do you? A. I have not been with him all the time; no.

Q. So you don't really know what caused this alleged tubercular condition of the plaintiff? A. Well——

Q. (Interrupting.) Answer that by yes or no, Doctor. Do you know or don't you? A. Your questions calling for yes or no are not fair.

Q. I cannot help it. A. You cannot ask medical questions that way. They must be explained.

Q. The question is, so you don't really know what caused this alleged tubercular condition of the plaintiff? A. I feel I know, having examined him at three different times, once a month after the accident.

Q. But you don't; do you? You don't? A. I know as well as I would in any private patient I examine.

Q. Then you want to go on this record that you do know, and you are definitely certain that this alleged accident, even though it may never have occurred so far as you know, was the cause of this tubercular condition, so-called tubercular condition of the plaintiff? A. I am assuming it did.

Q. You don't know whether it did or not? A. All of my testimony is based on that assumption. Of course, I did not see the accident.

Q. And you don't know what caused this tubercular condition or alleged tubercular condition, do you? A. I testified in my opinion the result of the accident.

Q. You say you don't know? A. Why should I say so?

239 Q. You do not actually know what caused this? A. Of course anybody may develop tuberculosis, but we are speaking of one specific case, and I know considerably about the man; I have examined him three times, and I know what happened.

Q. You did not see what happened to him, did you? A. No; but my whole testimony is based on the assumption it did happen.

Q. I am asking you a different question than the hypothetical question asked you by Mr. Axtell. Answer my question. You don't know what caused this tubercular condition? A. Well, of course, tubercular infection, of course, causes tuberculosis.

Q. And you don't know what caused that tubercular infection, do you? A. The breaking down of his resistance to the infection of those germs.

Q. And you don't know what broke them down? A. I know one sufficient cause, and that is the injury.

Q. You don't know that he had any injury? A. I heard him testify to it. He was under oath.

Q. That does not mean that he had one. That is in dispute here.

The Court. I shall instruct the jury that the testimony is as far as the accident is concerned is based upon the facts testified to and assumed in the questions put to the witness. If those facts fall his testimony falls. He said he didn't know what happened on the ship. He is assuming that from the questions put to him.

Q. How many times have you appeared in court the last month? A. The last month?

Q. For various plaintiffs? A. If I remember rightly, I think this is the only time this month.

240 Q. How many times the month before, in May? A. I can only guess, I am not sure. I was employed may be once or twice; I am not sure. I say that in May. I have no records with me.

Q. Doctor, would you say that I am misstating the fact if I said you appeared in court against me once in May; A. No; I don't know exactly; I may have been in court two or three times.

Q. You appear for the plaintiffs in court frequently in all manner of cases and all manner of diseases? A. Yes.

Q. How many times have you appeared for Mr. Axtell since January, roughly? A. I don't know, I think around—a number of times.

Q. Oh, make an approximation? A. That will be difficult.

Q. One hundred times? A. Oh, no; far less.

Q. Twenty times? A. Well, this is June—possibly.

Q. You appeared about twenty times for Mr. Axtell? A. I can not tell for sure.

Q. Have any of those been tuberculosis cases? A. Well, that I am not sure of. I would be entirely willing to tell you, but I don't recall.

Q. And you are willing to let your testimony stand, that this tubercular condition is due to the fact that this man was made to work after the accident; is that true? A. Yes.

Q. Do you know Doctor Thoburn? A. No; I do not.

Q. I hand you this Exhibit B and also Exhibit C, and ask you when those X rays were taken? A. June 3, 1927.

Q. And what is the condition shown on those X rays that leads you to believe this plaintiff has tuberculosis? A. Diffused infiltration of the lungs.

Mr. AXTELL. May I suggest the witness be permitted to use this light?

241 The COURT. If he wishes.

The WITNESS. A calcified tubercular lobe in one lung.

Q. And what does that mean in more plain words? A. It has become hardened into calcium salt.

Q. Any callus? A. No callus.

Q. Is that caused by anything besides the tuberculosis? A. No.

Q. Only by tuberculosis? A. Yes.

Q. Is that a sure sign of tuberculosis? A. Yes.

Q. Which lung is that? A. In the right lung. There is one here, that white spot; there is a second one there, this spot [indicating].

Q. Isn't that caused by something else? A. No, that is a tubercular condition. That is typical of a calcified lung.

Q. And that is what you base your diagnosis on? A. The infiltration.

Q. Did you ever find any bacteria in this man's sputum? A. No. I made—I only examined one of his sputa.

Mr. LANDIS. That is all.

Mr. AXTELL. Is there any other picture——

The WITNESS. That same spot is there.

By Mr. LANDIS:

Q. Is this the same, taken at the same time? A. The same day; yes.

Mr. AXTELL. How about the other X ray taken at an earlier date?

The WITNESS. No; they don't show evidence of tuberculosis.

242 Mr. LANDIS. Show the other one to the doctor, will you?

Q. Is this the same white spot there? A. That is on the rib, that is the union of the bony part of the rib with the backbone.

Q. This one little white spot there? A. No, that [indicating].

Q. Is this the backbone, Doctor? A. This is the sternum; this bone overlays his backbone.

Q. This is the front view? A. Yes.

Q. This is the front view, is it not? A. Yes.

Q. And then this is viewing the back part of the rib from the front, is it not? A. Yes.

Q. And that spot is some distance away from the backbone, is it not? A. I will have to take that back. These are the ribs at the back.

Q. Then this is the front rib? A. Yes.

Q. And that then is not connected to the backbones? A. No.

Q. That particular white spot? A. No.

Q. What is that? A. It is a part of the cartilaginous connection of the rib with the breastbone.

Q. As a matter of fact, isn't that what this white spot is, too? A. No; it is not.

Q. The white spot that you referred to before? A. No.

Mr. AXTELL. Indicating what? What do you mean? Referring to Exhibit A?

Q. Referring to white spot in Exhibit B that has been marked before? A. No; that is between the ribs.

Q. Is this a front or back view? A. It is a front view.

243 Q. And then that is a different view than Exhibit E, which we were looking at a minute ago? A. Yes.

Q. Then put Exhibit C before the light, Doctor, and let me see the spot. A. The spot is between the ribs, not on the ribs.

Q. And you base your whole diagnosis upon that one spot shown in that X ray? A. Further infiltration throughout the lung, as shown by this marking, out here.

Q. Couldn't that be done—couldn't that be caused by some disease? A. Not that kind of a marking.

Q. Couldn't that be caused for instance by bronchitis? A. No.

Mr. LANDIS. That is all.

Redirect examination by Mr. AXTELL:

Q. In making your diagnosis, did you use a stethoscope? A. Yes.

Q. And in taking your X ray? A. I made a general physical examination.

Q. And a fluoroscope? A. I made a general physical examination.

Q. Explain a fluoroscope, and what you can do with it. A. A fluoroscope is an instrument by which we can see into the body by means of an X ray behind the patient, which brings out a vision through the body.

Q. You can see the depth as well as directly through? A. Yes.

Q. And if there is any calcareous condition, or whatever kind of matter you described, in the internal part of the lung, through the fluoroscope you could see its relative position from the front to the back of the patient? A. Fairly well with a fluoroscope.

244 Q. You can as to fractures, is that true? A. Yes.

Q. So if a bone is fractured, whether overlapping or not? A. Because you can get different views.

Q. That is the purpose and object of using a fluroscope? A. Yes; to aid.

Q. What other observation did you make of the condition with the X ray and fluoroscope diagnosis that led you to the conclusion the man now has tuberculosis? A. The râlies in his chest.

Q. What are they? A. Those are abnormal sounds in breathing that we hear with a stethoscope.

Q. That is, you have a patient breathe and have a stethoscope on his chest and listen at different points and get the sound? A. Yes; there are normal and abnormal sounds known as râles.

Q. You speak of râles at the time you made your first examination? A. Yes.

Q. You diagnosed it then as what? A. As suspicious or incipient tuberculosis.

Q. And on your next examination did you test for râles? A. Yes.

Q. What did you find, Doctor? A. More extensive, or at least over a more extensive area.

Q. And then on your third examination? A. Still more extensive.

Q. Do you say or not this condition is permanent? A. Permanent.

Q. How long will he live? A. I could not say that. Under very favorable conditions he may live a long time, and it might be arrested; it may be stopped where it is and not progress further for a long time under favorable conditions.

Q. Change of climate? A. Probably under favorable treatment.

245 Q. Could you say for sure it could be arrested or cured? A. No.

Q. Could you say he could live ten or twenty or thirty years? A. I could not say.

Q. Is he fit for physical work, physical exertion? Is he fit to be a clerk in a store or bookkeeper or anything of that sort? A. I do not think he should do any indoor work.

Q. Is he strong enough to do any outdoor work? A. The lightest kind of work he might do at present.

Q. A watchman, where he did not have to move around? A. I suppose he could do that.

Q. It would depend on the place where he was to do it? A. Yes; it would.

Recross-examination by Mr. LANDIS:

Q. Doctor, this calcified area you remarked in Exhibit C, that might have been caused by something prior to the accident, might it not? A. It might; yes.

Q. Then why do you make your diagnosis at this time that this is tuberculosis when it might have been something that occurred before? A. Because it is tubercular and it is consistent with the rest of the appearance and the history and physical examination of the patient. That is only a part of the diagnosis.

Q. Something other than tuberculosis might have caused that? A. No.

Q. Only tuberculosis could have caused that calcified area? A. That is all.

The COURT. Doctor, that condition that you have described of calcification is a condition which is entirely not due to the accident?

The WITNESS. That area is; yes.

246 Q. Did you make the patient cough when you listened to these rales? A. I did.

Q. Did you listen before or after the cough? A. Both; I examined him without coughing, and then examined him just a little following.

Q. What did you find? A. I found these so-called crepitant and subcrepitant rales, and following the cough they were inclined to be moist.

Q. It really sounds something like a muscular movement, doesn't it? A. No; not to a practiced ear they don't.

Q. Have you a practiced ear? A. Yes; twenty-five years practice.

Q. Have you a practiced ear in the case of tuberculosis? A. Yes, from the beginning of medicine.

Q. How many cases of tuberculosis have you had in the last year? A. In the last year?

Q. Yes. A. Why, I have had fifteen or twenty cases.

Q. Do you handle them yourself without sending them to a specialist? A. I find it more convenient to have a specialist aid me in placing them in an institution, so I consult with specialists for that reason.

Q. You send most of them to a specialist, is that it? You can answer that by yes or no, for goodness sake. A. I will answer that. I have had consultations with specialists, and as I told you. consultants or specialists seldom make a diagnosis; they aid.

Q. Did you have any specialist in on Mr. Lustgarten? A. No.

Q. You did not go to that trouble in his case? A. It was not necessary. I was not his private physician, to admit or put him in an institution or anything of that sort.

247 Mr. LANDIS. That is all.

Mr. AXTELL. If your honor please, I want to call—unless you will stipulate—will you stipulate that twenty dollars a week would be a fair and reasonable expenditure?

Mr. LANDIS. No.

Mr. AXTELL. Then I will put a witness on as to the question of maintenance or expenditure by the plaintiff. I want to put the plaintiff on.

BENJAMIN LUSTGARTEN, recalled on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. Now, have you maintained yourself or through the aid of your relatives or credit with them been maintained with the exception—ever since this accident, with the exception of the period you were in the marine hospital of some three weeks? A. Yes, sir.

Q. Have you done any work? A. No.

Q. Have you earned any money at all? A. No money at all.

Q. Do you remember when you got back?

Mr. AXTELL. It is conceded that the plaintiff left the marine hospital at Staten Island April 30th, 1926.

Q. Except for that day or two in Kings County Hospital, you have lived where? A. My sister's house, for seven months, and my cousin's house for seven months.

248 Q. And you owe them for the board and lodging? A. My board and lodging and medical attention.

Q. Have you had any expenditures for doctor's bills? A. Yes, sir.

Q. How much have you expended?

Mr. LANDIS. If your honor please, I am going to object to all of this.

Mr. AXTELL. Will you take, your honor, the bill of particulars?

Mr. LANDIS. I object to this as immaterial, on the ground that this plaintiff when he entered the marine hospital had the opportunity to get cured; and if he did not do it, and he was discharged as cured, we are not responsible for his maintenance.

Mr. AXTELL. He was discharged from the marine hospital.

Mr. LANDIS. He could have gone back.

The COURT. Do you contend he has to be supported by the defendant?

Mr. AXTELL. For a reasonable period, until he is cured.

The COURT. He was discharged cured by the hospital.

Mr. AXTELL. I don't know what they really said about it.

Mr. LANDIS. They diagnosed the case.

Q. Did you leave the hospital of your own accord? A. No there was a man on the ship that died and he was very sick.

Mr. LANDIS. I move to strike this out as not material.

The WITNESS. He asked me——

The COURT (interposing). The answer is no. Next question.

249 Q. You did not leave the hospital of your own account? A. No.

Q. You were discharged although you were willing to stay there? A. Yes.

Q. And wanted to stay there, is that right? A. Yes.

The COURT. He was discharged by the hospital.

Mr. AXTELL. Yes; he was put out of the marine hospital.

The COURT. Do you contend that they did wrong?

Mr. AXTELL. Absolutely.

The COURT. Where is the evidence?

Mr. AXTELL. The evidence is he is tubercular and he was then.

Mr. LANDIS. Your own doctor has testified that he was not.

Q. How much did you spend for doctor bills?

The COURT. Where?

Q. After leaving the hospital? A. $150.

Mr. LANDIS. I object to this, too, on the ground it is immaterial, because the man received treatment; he could have received treatment from the marine hospital if he desired it, and he was discharged from the marine hospital, and he did not have tuberculosis at that time.

The COURT. Objection sustained.

Mr. AXTELL. Exception.

Q. Were you discharged as cured from the marine hospital?
250 A. I was discharged; that is all I know, I was given a plain piece of paper as a discharge.

Q. Did they ever offer to bring you back there and put you in there?

Mr. LANDIS. I object to that question.

Mr. AXTELL. Then your honor rules that out?

Mr. LANDIS. I object to that statement.

Mr. AXTELL. That will be proved, too, if necessary.

The COURT. Whether it can be proved or not, you have no right to state it, and you know it. The jury will disregard it.

Mr. AXTELL. I think in view of all that has been said on the subject, we ought to know why he was discharged from the hospital, and the circumstances. If your honor would look at this record, perhaps you would see it.

The COURT. I am not looking at anything, I only consider the evidence. You can prove your case in any way you see fit.

Q. Did you spend any money for drugs? A. Yes.

Mr. LANDIS. When?

The COURT. He may state.

Q. Did you spend any? A. I did.

Q. When? A. Last summer, all summer.

Mr. LANDIS. If your honor please, I move that the answer be stricken out as immaterial.

The COURT. He can not give it that way.

251 Q. When was it?

The COURT. He said last summer.

The WITNESS. Last summer.

Q. How long after leaving the hospital? A. About three weeks.

Q. After you left the hospital, where did you go? A. I went to live with my sister.

Q. In Philadelphia? A. Yes.

Q. Were you under the care of a doctor there? A. Yes.

Q. And what was his name? A. Dr. Rubin.

Q. What did he treat you for? A. General run-down health.

Mr. LANDIS. I object to that. This man does not know what the doctor treated him for.

Mr. AXTELL. I will withdraw that.

Q. What did the doctor do for you? A. He was taking care of my eyes, and having me go into the eye hospital, and give me a prescription for medicine.

Q. Were you doing any work at that time? A. No, sir.

Q. Just living at home with your sister? A. Yes.

Q. What is her name and address? A. Her name is Mrs. Carrie Singel, 202 Snyder Avenue, Philadelphia.

Q. Did this doctor charge you for services? A. He charged me; he sent me a bill; I could not pay for it.

Mr. LANDIS. If your honor please, I object to this.

252 The COURT. You take the answer, and if you do not like it you object to it.

Q. What was the amount of the bill?

Mr. LANDIS. I object to this.

The COURT. Objection sustained.

Q. How much do you owe your sister for board and lodging?

Mr. LANDIS. I object to that.

The COURT. Objection sustained.

Q. Did you make any agreement to pay her any certain amount for board and lodging?

Mr. LANDIS. I object to that.

The COURT. Objection sustained to all such questions.

Mr. AXTELL. Exception.

Q. What was the cost of your maintenance while you were sick and disabled after leaving the Marine Hospital?

Mr. LANDIS. I object to that.

Q. For the next seven months thereafter?

Mr. LANDIS. I object to the question.

The COURT. Objection sustained as to form.

Q. Did you spend any money for maintenance and cure or for board and lodging?

Mr. LANDIS. I object.

The COURT. When?

253 Q. After leaving the hospital?

The COURT. Objection sustained.

Q. Or within a period of seven months after leaving the hospital, did you make any such expenditure?

Mr. LANDIS. I object, if your honor please.

The COURT. Objection sustained.

Mr. AXTELL. Exception.

Q. Have you paid or contracted to pay your cousin in Brooklyn any sum for maintenance or cure or for your board and lodging or the cost thereof during the past seven months?

Mr. LANDIS. I object, if your honor please.

The COURT. Objection sustained as to form.

Mr. AXTELL. I direct your honor's attention to the last two or three lines of paragraph 10 of the complaint, in which we make specific claim for this disbursement.

The COURT. For what?

Mr. AXTELL. For maintenance and cure. It is in his bill of particulars, too.

The COURT. All right. Next question. I think I will allow him to answer.

Mr. AXTELL. There is a decision in the District Court of California, holding that his relatives can come in and sue for his maintenance and cure, that is for board and lodging and doctor, and recover from the ship's owner.

254 The COURT. You can ask him the question. Most of these objections are sustained as to form. You know how to put the questions.

Mr. AXTELL. Apparently I do not.

The COURT. It is about time you did.

Q. Have you expended any money yourself for board and lodging while you have been disabled and sick after leaving the hospital April 30th, 1926, to the present time?

Mr. LANDIS. I object to that on the ground it is leading.

The COURT. I will allow it. Objection overruled.

Mr. LANDIS. Exception.

A. I have.

Q. How much? A. The money that my father left over when he died.

The COURT. The question is, how much money have you spent for your board and lodging since you left the hospital? That is, that you spent out of your own pocket?

The WITNESS. About $300.

Q. Is that all you had? A. That is all.

Q. Has your sister or your cousin made other expenditures for the board and lodging or doctor's care since then on your behalf until now?

Mr. LANDIS. I object to that, if your honor please, as purely immaterial. This man has no right to recover any expenditures that his sister made.

The COURT. Objection sustained.

255 Q. Have you agreed to pay or reimburse your sister or your cousin for the disbursements they have made for maintenance and cure or board and lodging for your account?

Mr. LANDIS. I object to that.

The COURT. Objection sustained as to form.

Mr. AXTELL. I except. That is all.

The COURT. Why don't you ask him if anything was said about it, if you are really serious.

Mr. AXTELL. I do not understand your honor's ruling.

The COURT. Don't you understand that you can not ask a witness if he agreed, because it is a conclusion?

Mr. AXTELL. I have no more interest in the subject. I leave it to your honor to bring out any additional thing you want in the interest of justice.

The COURT. I can not try your case for you. It is not my place to bring out anything, if counsel is not competent.

Mr. AXTELL. I respectfully except to the suggestion of incompetency. That is all.

Cross-examination by Mr. LANDIS:

Q. Mr. Lustgarten, the $300 that you claim you paid out, to whom did you pay it? A. To my sisters and the doctors.

Q. How much did you pay to your sister? A. About $240.

Q. $240 to your sister? A. Yes.

Q. And on what did did you pay that? A. The court allowed me——

256 Q. (Interrupting.) Answer the question. A. At different times.

Q. When did you first pay her part of the $240; on what date? A. I don't know the date.

Q. Prior to March, 1926? A. I don't know the date.

Q. Was it prior to March, 1926? A. I don't remember the date at all.

The COURT. He has answered twice he don't know whether it was before or after.

Q. You don't know when you gave your sister $240? A. Last summer.

Q. How do you happen to say you don't know whether it was prior to March, 1926, then? A. I don't know the exact date at all. It was either in the middle of the summer or in the summer.

Q. Was this part of your father's estate? A. Yes.

Q. What is your guardian? A. Mr. Joseph Crowley.

Q. Where does he live? A. 1609 Snyder Avenue, Philadelphia.

Q. Is he any relative of yours? A. An uncle.

Q. Did he give you any money? A. He sent me to Mr. O'Brien.

Q. Who is Mr. O'Brien? A. He made a petition to the court, allowing me $10 a week until my funds were gone.

Q. When was this petition made? A. Last summer.

Q. When did you finally finish getting the funds? A. About sometime late in the summer or early in the winter.

Q. Beginning this summer? A. No; last summer.

Q. Beginning last summer? A. Yes.

257 Q. It only lasted a couple of weeks then? A. Yes; about four months.

Q. Four or five months? A. Yes.

Q. What was the total sum you received? A. I don't know. It came in four checks.

Q. Then you don't know how much you paid anybody, do you? A. I paid the entire sum that I drew from my father's estate to my sister.

Q. You paid the entire sum which was $240. A. Whatever it was, either more or less. I got it in three checks, $80, $80, $75, I don't remember; $65 or $75, I don't remember which.

Q. $65, $75, and $80? A. $80—two $80's.

Q. Is that the way they paid you $10 a week, by three checks? A. Yes.

Q. Didn't you travel during this period at all? Didn't you take trips to Philadelphia and back to New York and over to Atlantic City? A. I went to Atlantic City and lived in a friend's house in the summer time.

Q. Didn't you spend any of that money in Atlantic City? A. No.

Q. Where did you get your money to go down there? A. My sister gave it to me.

Q. Was that after you paid her this money? A. No; before she got anything at all.

Q. And then this money you were paying her was in repayment of that loan you received to go down to Atlantic City? A. This was for board and lodging for the time I stayed there.

Mr. LANDIS. That is all.

Mr. AXTELL. That is all.

(Witness excused.)

258 MARTIN WEISS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation, Mr. Weiss? A. Manager of store.

Q. Do you live in Brooklyn? A. Yes.

Q. Are you married? A. Yes.

Q. Is this boy related to you? A. A cousin.

Q. Has he been living with you for some time past? A. He has been living with me since the middle of December, 1926.

Q. Have you paid for his meals and room?

Mr. LANDIS. If your honor please, I object to that.

The COURT. It will be received subject to a motion to strike it out.

Q. What was the reasonable value of his board and lodging and whatever he has had in the way of home comforts at your house during that period?

Mr. LANDIS. I am going to object to this question on the ground it is immaterial, because this maintenance and cure obligation I believe ceased when the plaintiff left the marine hospital at Staten Island, and he is not entitled to maintenance and cure after that time, and if my contention is correct this evidence is improper.

The COURT. How long do you say he is entitled to it?

Mr. AXTELL. Judge Storey, the former Chief Justice of the Supreme Court of the United States, and also Judge Hough, of this Circuit Court of Appeals, held that it extended for a reason-
259 able period. The law was formerly, as held in the "Osceola" case, that it extended to the end of the voyage. But it has been construed since then as extending beyond the period of the voyage.

The COURT. It does not necessarily contemplate damages for the rest of his life.

Mr. AXTELL. No. On the question of maintenance and cure, the Admiralty courts have been liberal in this State for years. Suppose the hospital is mistaken in its diagnosis of his condition.

The COURT. The ship is not obligated to cure.

Mr. AXTELL. It was obligated to take care of him.

The COURT. It is obligated to take care of him. Really, the basis of it is, that nobody is at fault, nobody is to blame. He is a member of the ship's company. He gets sick, and is a sick man, and is entitled to to be taken care of until he is brought home, and when he is landed in his home port if he needs medical attention the ship must see that he is put in a hospital. When he is put in a hospital

and taken care of, and his condition is no fault of the ship, certainly you can not expect anything further.

Mr. AXTELL. Your honor has a misapprehension of the situation. In the beginning there was no application for indemnity at all.

The COURT. That is another question.

Mr. AXTELL. Let us get this record straight.

The COURT. Where is this in your bill of particulars, about doctor's bills and expense for board and lodging.

260 Mr. AXTELL. In the supplemental bill, for board and lodging. I should think you could admit it and cover it in your charge as a matter of fact, and it would answer the same purpose.

The COURT. You may prove these damages under the second cause of action as part of the loss and expense of obligation incurred, if it is specialized in the bill of particulars and if the expenditure was one which the plaintiff contracted to pay.

Q. What was the just and reasonable value of what you furnished him in the way of food and lodging while he was with you? A. You mean the total expenditure I have had?

Q. Yes. A. A period of about 25 weeks at about $20 a week; sometimes it ran over it, and some weeks a little under it.

Q. How much a week? A. I would state it at $20 a week.

Q. How many weeks? A. 25 weeks.

Q. About $500. A. Yes.

Q. Has he made arrangements to pay that back?

Mr. LANDIS. I object to that.

The COURT. He may state what was said between the parties.

The WITNESS. When he came to me, he remarked his sister can not afford to support him, and he begged me to take him in. He said no matter what happens he would promise to pay me, not matter whether he got it in the case or after the case, no matter what happened, he said he would do his utmost to repay me.

The COURT. Did you agree on an amount?

261 The WITNESS. No; it was not agreed on in amount, because I didn't know how long he would have to stay with me. As a matter of fact, at the time when he came to me, the doctor told me that he would not live long.

Mr. AXTELL. That is all.

Cross-examination by Mr. LANDIS:

Q. What is your address? A. 19 Throop Avenue.

Q. Is that your residence? A. Yes.

Q. Do you know the name of your mail carrier out there? A. No; I don't. I know what station it is.

Q. What station? A. Station at Broadway and Barrett Street.

Q. There was no definite understanding made with the plaintiff as to the pay? A. What do you mean by definite understanding? As to what?

Q. As to the amount you would be paid? A. There was no definite understanding as to what time he would stay with me. He did promise to repay me.

Mr. LANDIS. That is all.

Mr. AXTELL. That is all. Plaintiff rests.

(Plaintiff rests.)

Mr. LANDIS. Now, if your honor please, I move to strike out that part of the complaint that asks for maintenance and cure beyond the end of the voyage. There is no proof in this case as to the maintenance and cure and wages the plaintiff is entitled to.

The COURT. He said he spent money for his eyes, the condition of his eyes.

262 Mr. LANDIS. That was all done in Philadelphia afterwards, after he got out of the hospital. However, he said he paid the money—that he paid to this sister of his, he got three checks, $80, $75, and $65, and that was all paid to his sister.

The COURT. Did the plaintiff say what he actually paid on medical payments?

Mr. AXTELL. No.

The COURT. What is there in the case?

Mr. AXTELL. An expenditure of about $300, that he said he spent.

Mr. LANDIS. He paid it to his sister.

The COURT. Is that the only expenditure?

Mr. AXTELL. In Philadelphia. The rest of it is his cousin, and $150 that he said he paid out to doctors.

Mr. LANDIS. He did not say anything about $150 to the doctors. He said he got this money from the estate, the only money he had, and that was paid to his sister.

The COURT. Put him back on the stand.

BENJAMIN LUSTGARTEN recalled. By the COURT:

Q. Did I understand you to say you paid some doctors' bills out of this money? A. My sister helped me pay for that.

Q. The only money you expended then was the item of $18.65 and the item of $75? A. My cousin gave me the money for that.

Q. The only thing that you spent for board and lodging? A. $56 for medicine.

263 Q. Did you make any promise to your sister as to the repayment of this money? A. I was going to pay her when well enough to work.

Q. During what period were you living with her? A. From November—from April to December, 1926.

By Mr. AXTELL:

Q. And how much did you promise you would pay her? A. I promised I would pay her $10 a week.

Q. Do you owe her any money yet? A. I owe her for the whole six months.

Q. Six months? A. Yes.

Q. That is, this money that you gave out of your father's estate, or what belonged to you, was on the doctors' bills? A. She paid

doctors' bills, bought me this suit, shoes and socks, and things like that.

Mr. AXTELL. That is all.

Mr. LANDIS. That is all. I renew my motion on the ground that the right of this man to recover ended on his discharge from the marine hospital, and there is not any proof of any money paid by this plaintiff prior to the time he was discharged from the marine hospital; that at the time he was discharged from the marine hospital, was a reasonable time after the accident occurred in view of the fact that the man did not have tuberculosis at that time, and the ship was under no obligation to maintain him or take care of him.

The COURT. I will grant the motion and allow you (Mr. Axtell) an exception.

Mr. LANDIS. I renew my motion to dismiss the second cause of action on the ground that this man was given all the medi-
264 cal treatment that was necessary on board that vessel, and was given adequate care and attention.

The COURT. This motion has been argued at length—unless there is something new. I ruled on it before.

Mr. LANDIS. I will withdraw that.

The COURT. I will deny the motion and allow you an exception. I will say to the jury that during the recess the court ruled there can be no recovery in this case on the first cause of action; that there was no liability on the ship for the injury suffered at the time the accident occurred. That leaves only the second cause of action, which is based on an allegation that after the man was hurt he was ordered to work when he should not have been working, and that cause of action remains.

Mr. LANDIS. I would like to make a motion that the second cause of action be dismissed as against the second defendant, the Consolidated Navigation Company. Exhibit 4 introduced in this case is the operating agreement which shows upon its face that the Consolidated Navigation Company was not the agent.

Mr. AXTELL. There is nothing new in that motion. It has been ruled on by a dozen judges before, and they have always denied it. Their agent is not a disclosed agent to this plaintiff, and the courts have repeatedly held that under this contract both of these defendants are liable.

The COURT. As owners?

Mr. AXTELL. Yes.

265 Mr. LANDIS. That is not the case. The operator is not liable as owner. It has been held by the Circuit Court of Appeals that an owner may be held, not an operator.

The COURT. Motion denied.

Mr. LANDIS. And I take an exception. I move for a dismissal of the second cause of action on the ground that the United States of America owns this vessel, as shown by this operating agreement, and the United States Shipping Board Emergency Fleet Corpora-

tion is merely the agent of the United States in the operation of the vessel.

The COURT. Motion denied.

Mr. LANDIS. Exception. I should like first to introduce the naval record of Captain Lee.

Mr. AXTELL. I object to it as incompetent, irrelevent, and immaterial and hearsay and self-serving.

Mr. LANDIS. Under the hand and seal of the Secretary of the Treasury.

Mr. AXTELL. That does not make it material or relevant.

The COURT. How is it material?

Mr. LANDIS. The second cause of action alleges the brutality, the incompetency, and the cruelty of the master, and further alleges that this master is not the sort of a person to have on board such a vessel.

The COURT. Where does it allege anything of the kind?

Mr. AXTELL. Where does the word "brutality" and "cruelty" occur? It says negligence.

Mr. LANDIS. "Although plaintiff demanded that he be
266 furnished medical treatment and be allowed to be relieved from work, the same was refused him and he was compelled to and did work, and he sustained the injuries; when he asked to be relieved from duty and to be put ashore at the hospital, such request was refused," and states further that the said condition was known to the officers and master of said vessel.

The COURT. Objection sustained.

Mr. LANDIS. Exception. Now, if your honor please, I am going to read the deposition of Captain William H. Lee. It is a lengthy one, and I will try to pick out that part only which is relevant.

"Captain WILLIAM H. LEE, produced as a witness on behalf of the defendants, being duly sworn, testified as follows:

"Direct examination by Mr. LANDIS:

"Q. Captain, what is your profession? A. Master mariner.

"Q. What ship are you now master of? A. Motor ship 'Sawokla'.

"Q. When will she next be at New York? A. Probably in July.

"Q. Was there ever a man with you as a member of the crew by the name of Benjamin Lustgarten? A. Yes."

Mr. LANDIS. There is a copy of this deposition in the files of the clerk's office. The deposition was taken at Jacksonville and sent up to the court directly, the original. Shall I proceed?

267 The COURT. Yes.

Mr. LANDIS. This was taken March 31, 1927, at Jacksonville, Florida. [Continuing reading:]

"Q. How many voyages did he make? A. A portion of one voyage.

"Q. Do you recollect when and where you signed him on? A. I think at Baltimore.

"Q. Do you remember when? A. I think in January.

"Q. What year? A. 1926.

"Q. What did you sign him on as? A. Able seaman.

"Q. Was he later made second cook? A. He was.

"Q. When and where did that take place? A. At his own request, at either Avonmouth or Swansea.

"Q. Where are those ports? A. Avonmouth, England, or Swansea, Wales.

"Q. That was on this same voyage? A. Same voyage; at his own request.

"Q. What foreign ports did the 'Coelleda' make on that voyage? A. The ports of Manchester, Avonmouth, and Swansea, in the United Kingdom.

"Q. You went to Punta del Garda to, did you not? A. I did.

"Q. Any other ports besides those four? A. No other foreign port.

"Q. Where did you sign Lusgarten off? A. In the American consulate, before the American consul, in Punta del Garda, Azore Islands.

"Q. Did you sign the entire crew off there? A. No.

"Q. How did it happen that you signed Lustgarten off there? A. On the advice of a physician.

268 "Q. What physician was this, do you know? A. A physician who is the port health officer and who also has a civilian practice.

"Q. At Punta del Garda? A. Yes.

"Q. You signed him off before the American consul? A. Yes.

"Q. Do you recollect the date that this occurred? A. I think March 15th.

"Q. Did you pay him any wages at that time? A. He was paid his wages up to and including the date of discharge.

"Q. Did you make any arrangements with the consul at that time concerning Lustgarten, concerning who was to stand the expense for Lustgarten's keep while he was at Punta del Garda? A. No; I did not.

"Q. Have you seen Lustgarten since you paid him off, on or about March 15th? A. No.

"Q. Do you recall on what date you first knew Lustgarten was ill? A. Some days after sailing from Swansea.

"Q. Two days after? A. No; more than that.

"Q. Four days after? A. More than that. I believe about March 7th.

"Q. You are not certain of that date? A. No; I am not certain.

"Q. Did you have any conversation with Lusgarten concerning his illness? A. Yes.

"Q. Do you recollect when it occurred? A. I think that on March 7th I interviewed Lustgarten.

"Q. Was it the same day that you first knew that he was ill? A. Yes.

"Q. Do you recollect where this conversation took place? A. Near the galley, I think.

"Q. What did he tell you concerning his illness? A. He seemed to be——

269 "Q. No; what did he say? A. He didn't appear to know definitely what had caused his injury, or alleged injury, but gave us a supposition, in his statement to me, that he might have injured his chest by a lurch of the ship, causing his chest to strike the ship's rail.

"Q. Did he say anything about having slipped? A. No; he did not.

"Q. Did he say anything about having tripped on anything? A. No; he did not.

"Q. Did he tell you what he was doing at the time that his chest struck the rail? A. Yes; he said that he was dumping slops or garbage.

"Q. Did he say that he was dumping ashes at that time? A. I think that he made no reference at all to ashes.

"Q. Did he tell you that he had been hit by a wave? A. No; he did not.

"Q. Did he or did he not tell you that he had been struck by a wave? A. He said nothing about being struck by a wave.

"Q. Did he or did he not inform you at that time that he had been knocked unconscious? A. He said nothing about being knocked unconscious.

"Q. Did or not any one during that voyage tell you the plaintiff had been struck by a wave? A. Nothing was said to me by any one regarding Lustgarten having been struck by a wave or knocked unconscious.

"Q. As master of the 'Coelleda', were serious injuries reported to you—serious injuries to your crew reported to you? A. Absolutely.

"Q. What is the custom at sea, on a vessel of this type, concerning the master of the vessel being informed if a member of his crew is knocked unconscious while in the line of his duty? A. He is at once informed.

270 "Q. How many members of the crew of the 'Coelleda' were there after she left Swansea? A. Thirty-six.

"Q. You say that definitely? A. Yes—wait a moment; no, I am in error there; I had no steward. Thirty-five.

"Q. Did Lustgarten tell you on what day the accident occurred? A. He claims an accident to have occurred on the fifth.

"Q. Did he tell you the time of day it occurred? A. Not that I recall.

"Q. Did you see any marks on Lustgarten at this time? A. None whatever.

"Q. Was Lustgarten in bed? A. No.

"Q. Did he have any appearance of having been injured? A. No. He was carrying on with his work, and from all outward appearance was as well as ever.

"Q. Did you see him cough any blood at any time? A. No.

"Q. Did he say anything to you about an injury to his eyes? A. No; he did not.

"Q. Did his eyes appear to have been injured? A. Not at all.

"Q. Was any report made to you on that voyage that Lustgarten had injured his eyes? A. No.

"Q. Did Lustgarten say anything about any ribs being broken? A. No.

"Q. Was Lustgarten working at the time the vessel arrived in Punta del Garda? A. No. I had previously relieved him from duty.

"Q. Did he do any work after he reported the injury to you? A. He worked, I think, for a day or two.

"Q. Did he request to be relieved from duty? A. No. I relieved him of my own volition.

271 "Q. How did you happen to do that? A. Because I observed flecks of blood, or blood-stained saliva, on his shirt front; and while he claimed no serious illness, nor did he appear to have any serious illness, I deemed it prudent, because of these indications, to take him out of the galley and the handling of food. He also remarked I think that he at times felt dizzy to a slight extent. And so for those reasons I took him out of the galley; not at his request, but in absolutely my own judgment.

"Q. Did you ever order him to go back to work after that time? A. Oh, no.

"Q. To your own knowledge he didn't work after that time? A. I am positive that he did not.

"Q. The depositions of six members of the crew have been taken in New York, as witnesses for the plaintiff; all but one of them state that Lustgarten—that they saw Lustgarten working after the accident was supposed to have occurred. What have you got to say about that? A. Lustgarten probably did perform some duty for a day or two after I was informed of his alleged injury, in much the same manner as he had performed duty between the time of his alleged injury and the subsequent time that he reported that alleged injury to myself.

"Q. Was Lustgarten given any medical attention by you? A. No.

"Q. Do you know whether anybody on board did give him any medical attention? A. I believe that the second officer sought to make him comfortable.

"Q. How did it happen that you didn't give him some medical attention? A. Not being a medical man, I had an insufficient knowledge of medicine to properly diagnose the case, and so for that reason I could render no intelligent, skilled assistance to him.

"Q. Did you have any medicines aboard? A. We had the usual medicine chest.

272 "Q. When did you last secure medicines for this vessel, prior to the commencement of this voyage? A. Prior to the last voyage of the vessel.

"Q. As is the custom, upon the arrival of the vessel each voyage in her home port; that is to say, at Baltimore."

Mr. LANDIS. Apparently there is no answer. Skipping now to page 15. [Continuing reading:]

"Q. Did Lustgarten tell you where the alleged accident occurred? A. Yes; he mentioned the aft end of the house, and the rail; that is the end of this athwartship passage.

"Q. Do you know more definitely where it occurred? A. I don't know which side he claims. It is on that—I am referring to the aft end of the bridge deck; that is a space perhaps three feet wide.

"Q. When you sailed from Swansea, what was to have been your next port of call? A. New York.

"Q. Did you at that time intend to go to Punto del Garda, Azores? A. No; my ship was cleared for New York.

"Q. You did go there from Swansea, did you not? A. I did."

Mr. LANDIS. I will now skip several pages, to page 30. [Continuing reading:]

"Q. Do you recall the weather you encountered, captain, at the time you left Swansea, the weather that you encountered? A. Yes; heavy weather.

"Q. Do you recollect the wind force on the successive days after you left Swansea? A. On some days the velocity of the wind reached forces eight, nine, and ten of the Beaufort scale.

273 "Q. Did this weather persist; did that wind force persist? A. Not constantly; the wind moderated on some days."

The COURT. How is this material as the case now stands?

Mr. LANDIS. It is my contention that unless they can prove that this accident occurred, they are not entitled to recover under the second cause of action, because the second cause of action is based upon the claim that the accident occurred. It is not based upon sickness; it is based upon the claim that the accident occurred.

The COURT. What differences does it make whether there was an accident or not, if the man was sick?

Mr. LANDIS. Isn't this whole case predicated upon the accident? Is not the whole complaint based upon the accident? If your honor please, he has not stated a cause of action at all, unless he refers back to the first cause of action in which he alleges that this accident occurred, and reiterates the facts set forth there and repeats them with the same force and effect in the second cause of action as if set forth there at length, and he does not allege any negligence, and he does not allege any contract of employment.

The COURT. It is based on negligence. It is based on the neglect of the ship company to take care of him when sick.

Mr. LANDIS. We admit he was ill, oh, yes; we admit that he did get ill aboard ship; but that second cause of action does not allege the employment of this man as a seaman on board that vessel

274 unless we refer to the first cause of action. It does not state a cause of action unless you include the allegations made in the first cause of action.

The COURT. I will let it in, but it does not seem to me that it is material to talk about the weather.

Mr. LANDIS. I understood your honor to instruct the jury they can only find damages in the second cause of action if there was an accident.

The COURT. They may find for the plaintiff even if they thought the accident happened in some other way, and the man fell down. I do not instruct the jury that they have to find that the accident occurred precisely as he described it. I do not see that it makes any difference, unless it be your contention that the story is made up out of whole cloth, and you can rebut that by proving what actually happened.

Mr. LANDIS. That is what I want to do and I should like the opportunity to convince the jury that this whole thing is a fabrication.

The COURT. But what has the velocity of the wind to do with it?

Mr. LANDIS. I will leave this out, and prove whatever I want to prove in my direct case by these other witnesses. That is apparently all.

Mr. AXTELL. Can you call your next witness while I am reading over this deposition?

Mr. LANDIS. Yes.

275 PETER JOSEPH O'CONNOR, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. What is your occupation? A. Mariner.

Q. What ship are you now with? A. The steamship "Artegas."

Q. Is that a ship of the Shipping Board? A. Yes.

Q. Did you ever sail on the "Coelleda"? A. Yes, sir.

Q. Were you on the voyage during which this alleged accident occurred in March, 1926? A. Yes, sir; chief officer of the ship.

Q. Did you know Benjamin Lustgarten, the plaintiff? A. What?

Q. Did you know Benjamin Lustgarten, the plaintiff? A. I didn't know him until he came on the ship.

Q. But you knew him after he was on the ship? A. Yes.

Q. Did you ever have any conversation with Mr. Lustgarten around March 6th or 7th, 1927? A. On the morning of March 6th, when I came off duty at eight o'clock in the morning, I walked up around the ship to see that everything was all right, the usual practice.

Mr. AXTELL. I move to strike that out as not responsive.

The COURT. It may stand.

Q. Just answer by yes or no, and then I will ask you what the conversation was. A. Yes.

Q. What conversation did you have? Where did you have this conversation? A. At the galley door.

276 Q. What time was this conversation? A. About five minutes past eight in the morning.

Mr. AXTELL. I object to that and move to strike it out unless it be shown whether it was before or after the accident.

Mr. LANDIS. It is stated that he talked with him on March 6th.

The COURT. Objection overruled.

Q. What was said in this conversation? A. Lustgarten told me he was not feeling good, and was spitting blood. I asked him what was the matter with him, and he said he didn't know. He said, "I sprained myself." I said, "Anything else?" He said, "Not that I know of." I said, "You have got consumption then."

Q. What did he say? A. He said that was a nice thing to say to a young fellow twenty-three years of age.

Q. Did you witness any accident to Lustgarten on this particular trip? A. No, sir.

Q. What is your watch? A. 4 a. m. to 8 a. m., and 4 p. m. to 8 p. m.

Q. And you were on watch at the time between six and seven in the evening? A. Yes, sir.

Q. Was that every day? A. Every day.

Q. That was on March 5th? A. On March 5th.

Q. Where are you when you are on watch? A. On the bridge.

Q. How unusual is it for a wave to come up over the after end of the amidships house; unusual enough for you to remember it?

Mr. AXTELL. I object.

Mr. LANDIS. This is a hypothetical question asked of a man that has been at sea.

277 Q. How often have you seen a wave come up over the after end of the amidship section of the house? A. I never saw any.

Q. Of the "Coelleda" or any ship? A. I have seen it come over an Isherwood ship.

Q. Never over the "Coelleda"? A. No.

Q. And you can say definitely none came up over the "Coelleda"? A. Not over the amidship section, no.

Q. Did you have any spray come up? A. Spray flies over the ship.

Q. What is the nature of the spray, heavy spray or light spray? A. When the sea rises and the wind is blowing, the top of the sea flips up and the wind catches that and splashes it over the ship, like a heavy shower of rain.

Q. Did you ever see Lustgarten working after he had this conversation with you? A. No, sir.

Q. Do you know whether he was relieved from duty? A. Yes, he was relieved from duty.

Q. You know that of your own knowledge? A. Yes.

Q. Do you know what date he was relieved? A. I can not say, a day or so after it was reported to me, though.

Mr. LANDIS. That is all.

Cross-examination by Mr. AXTELL:

Q. Have you been working for the defendant ever since this accident happened? A. Yes, sir, the United States Shipping Board, if that is the defendant.

Q. Do you expect to continue in their employ? A. Yes, sir, if they will keep me.

Q. Have you been talking this case over, what you would testify to, before you came up here? A. No, sir.

Mr. AXTELL. That is all.

(Witness excused.)

278 RAYMOND P. ABBOTT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Mr. Abbott, what is your present occupation? A. Insurance.

Q. Where? A. Boston, Massachusetts.

Q. Do you live in Boston? A. I live in Newburyport.

Q. How long have you been in the insurance business? A. About eight months.

Q. Have you ever been at sea? A. Yes, sir.

Q. Have you ever sailed on the "Coelleda"? A. Yes, sir.

Q. In what capacity? A. Second mate.

Q. Were you on the "Coelleda" in March, 1926? A. Yes, sir.

Q. In the capacity of second mate? A. Second mate; yes sir.

Q. Do you remember Benjamin Lustgarten, the plaintiff in this action? A. I do.

Q. Did you ever see any accident to Lustgarten during that voyage? A. No, sir.

Q. Did you ever have any occasion to make any physical examination of Lustgarten during that voyage? A. I did.

Q. Were you the officer who attended to the medical needs of the seaman aboard the ship? A. Yes.

Q. What date did you make this physical examination? A. About—I am not sure about the date—about March 6th or 7th.

Q. How did it happen you made a physical examination? A. Lustgarten came around to my room.

279 What did he say to you? He said he had been hit by a wave and had a pain in his chest and a cough.

Q. Did he say how he was hit? A. I am not sure whether he said he was struck by a wave or not, but he did tell me he had a cough.

Q. What did you do? A. I took him around to the hospital for an examination.

Q. And what did you find in that examination? A. I could not find anything, no bruises showed, but he did have a cough, and his tongue was coated, and a slight fever.

Q. Did he have any blisters on his back? A. No blisters on his back.

Q. Did he have any mark or scar on his head? A. No.

Q. Did he have any swelling to his jaw? A. No.

Q. What did you do for him at that time? A. I told him to turn in, and I gave him a physic; I told him not to worry.

Q. What did you do then? A. I went on watch.

Q. When did you next see Lustgarten after that? A. The next morning.

Q. Where did you see him? A. Down in the hospital.

Q. Was he still in the hospital at that time? A. I don't remember whether he was up around or whether he was in the hospital.

Q. And you reported to the captain in the meantime? A. I told the captain that morning.

Q. That morning after you saw him in the hospital the second time? A. After I saw him in the hospital.

Q. Do you remember the condition Lustgarten was in the second morning? A. He said he was feeling all right.

Q. When did you next see him after that? A. I saw him that night.

280 Q. Where was he then? A. He was up around; he was standing in the passageway about 5 o'clock. He had on an undershirt and a pair of pants.

Q. Did you give him permission to get up? A. No, sir.

Q. Did you order him to go back to bed? A. I did.

Q. Did he go? A. He did not.

Q. What did you do when he did not return to bed? A. Nothing I could do. He stayed up until he wanted to turn in himself.

Q. When did you next see him? A. That same night.

Q. What time? A. About 7 o'clock.

Q. Seven o'clock in the evening? A. Yes.

Q. Where was he then? A. In the hospital.

Q. What condition was he in? A. He was not feeling very good, he said.

Q. Did you do anything for him? A. I gave him another physic, as he said the one I gave him the night before had not worked, and turned him in in plenty of blankets, so he was warm.

Q. Then you left him? A. I left him.

Q. When did you next see him? A. The next morning.

Q. The next morning? A. Yes.

Q. Can you recollect the dates, approximately? Do you know what date this is now? A. No; I would not say the date; it would be the day after the first——

Q. (Interrupting.) This is the first day after now, isn't it, or the second day after he first came to you? A. Yes; the second day

Q. (Interrupting.) This is the first day after now, isn't it, or the first.

281 Q. And he was up and around again? A. That morning he was up and around again, yes.

Q. Did you order him to go back to bed that day? A. I did.

Q. What happened then? A. He said he was feeling better. He said he would stay up.

Q. When did you next see him? A. That night.

Q. Where did you see him at that time? A. Down in the hospital, about half past four in the afternoon, after I came off watch. He had been working that afternoon.

Q. He had been working that afternoon? A. Yes.

Q. Did you order him to go to work? A. No.

Q. Did he tell you why he had been working that afternoon? A. He said he just went into the galley to help the cook out.

Q. He said that to you then? A. Yes.

Q. How was he feeling then? A. He did not feel very good.

Q. What did you do for him? A. He had a slight fever, and I gave him spirits of nitre that night and turned him in.

Q. When did you next see him? A. At four o'clock the next morning.

Q. Where did you see him then? A. Approximately four o'clock, about a quarter past four.

Q. Where did you see him then? A. He was sitting up in his bunk, with a port open, and the wind blowing on him, and choked with phlegm, and could not hardly breathe.

Q. What did you do? A. I got a hot water jug and put it in with him and cover him up with blankets and closed the port.

Q. When did you next see him? A. That same morning.

282 Q. Where was he then? A. He was in the hospital or around the hospital.

Q. How was he feeling? A. Not very good.

Q. When did you see him after that? A. That same afternoon.

Q. Where was he then? A. He was sitting up in the hospital.

Q. Did you give him any further medical treatment besides that you have already testified to? A. No, because after that he seemed to get along all right; that is, as well as he could.

Q. Do you know of your own knowledge whether or not he worked at any time after the one period that he worked when you say that he worked himself? A. I don't know of any other period.

Q. Do you know whether he was relieved from duty as second cook eventually? A. Why, he did not go into the galley after that night when he came up to me except that one afternoon.

Q. Did he ever complain any about his eyes? A. He said just before he got into Punta del Garda, that he could not see very well; his eyes bothered him at times.

Q. Did he say anything about any ashes? A. No, sir; he never told me anything about ashes.

Q. Did he ever complain of anything being in his eyes? A. No.

Q. The plaintiff has introduced and exhibited here an affidavit of the plaintiff in this action in which it is stated that the captain kept on saying, "Give him another dose of salts," but Mr. Abbott, the second officer, said, "Captain, you will kill him if you keep giving him Epsom salts," and the captain said, "That is what I want to do."

Mr. AXTELL. I object on the ground he is trying to impeach his own evidence.

283 Q. Is there any truth in that statement? A. No, sir.

Mr. AXTELL. I object to it on the ground he is impeaching his own evidence.

The COURT. The form of the question is objectionable. Did that happen?

The WITNESS. No, sir; that did not happen.

The COURT. Did you ever hear the captain say that?

The WITNESS. No, sir.

Q. Did you ever take Lustgarten to the bridge of that vessel to see the captain? A. No, sir.

Q. Were you ever present when the captain was with Lustgarten? A. No, sir.

Q. Did Lustgarten ever say anything to you about the captain having made him go to work? A. No, sir.

The COURT. Did the captain ever order him back to work?

The WITNESS. No, sir.

Q. You never saw Lustgarten unconscious, did you? A. No.

Mr. LANDIS. That is all.

Mr. AXTELL. I move to strike out the last answer as being an answer to a leading question.

Mr. LANDIS. That is a little late.

The COURT. Motion denied.

Mr. AXTELL. May I have official log?

Mr. LANDIS. Yes [producing paper].

284 Cross-examination by Mr. AXTELL:

Q. Will you read that entry of March 15 and see if that refreshes your recollection? A. Do you want it read out loud?

Q. I ask you to read it.

Mr. LANDIS. Mr. Abbott, you did not make that log, did you?

The WITNESS. No.

Mr. LANDIS. I object to it.

The WITNESS. No; I did not make the entry.

Q. Did you see it? A. No.

Q. You never saw it before today? A. No; I did not see that entry. I never saw the official log book except when I signed for my wages.

Q. Well, have you gone over your testimony—what you are going to say here on the witness stand—before coming in? A. No, sir; I am just stating the facts.

Q. You have not talked it over at all? You could not talk it over with a lawyer and still state the facts, could you? A. Surely.

Q. What did you mean by that remark, "I am just stating the facts"? A. Stating the truth.

Q. Couldn't you talk to a lawyer before trial and still tell the truth? A. Yes.

Q. Why did you deny you talked this over with counsel before going on the witness stand? A. I have not denied. Please repeat the question.

Q. He is sitting here and listening to your answers. Why did you deny it? A. I did not deny talking it over with the counsel before I came on the witness stand.

Q. You did not? A. No.

Mr. AXTELL. That is all.

285 Redirect examination by Mr. LANDIS:

Q. Did you accompany Mr. Lustgarten to the hospital at Punta del Garda? A. I did.

Q. Did Lustgarten have any aid in getting him down the ladder alongside of the ship? A. No, sir.

Q. Did he have any assistance in going through the streets of Punta del Garda? A. No, sir.

Mr. LANDIS. That is all.

Mr. AXTELL. That is all.

Mr. LANDIS. I would like to introduce this log book.

Mr. AXTELL. I would like to recall the man and ask him one question.

Mr. LANDIS. I want to put in the log book.

PETER JOSEPH O'CONNOR recalled.

Mr. AXTELL. I want to call this witness back.

Mr. LANDIS. This is not your case.

The COURT. Next question.

Mr. AXTELL. I recalled this witness, I understood, to question him.

The COURT. Question him then.

Mr. AXTELL. His counsel says he is going to do it first.

The COURT. If he wants to question him, let him to it.

Mr. AXTELL. I want a ruling, that is all. If your honor rules that way, very well.

The COURT. I do.

Mr. LANDIS. Are you willing to concede that this is the log?

286 Mr. AXTELL. I never looked at it, and I won't concede it in evidence.

By Mr. LANDIS:

Q. I hand you this book and ask you what it is? A. That is the log book of the ship. In other words, as the chief officer of the log book, to keep an entry of the log, written up by each of the three officers aboard the ship, the performance of the ship, the weather, the course steered, etc.

The COURT. That is enough of that.

Q. What period of the voyage of the "Coelleda" does that cover? A. From January 20, 1926, to April 2, 1926.

Mr. LANDIS. I offer it in evidence.

Mr. AXTELL. You offer the log in evidence?

Mr. LANDIS. Yes.

Mr. AXTELL. I object to it.

The COURT. Objection sustained.

Mr. LANDIS. So much of it as is pertinent.

The COURT. Objection sustained.

Q. What were the weather conditions that existed on March 5, 1926, at six o'clock p. m.? A. The weather on March 5 had calmed down. On March 2 we had a gale, a force of about 9 to 10. On

March 3 the wind was about 6, and on March 4 about 5, which was a moderate gale.

Q. Are you sure of that? A. I am not quite sure, but at the beginning of March, the first or second day of March, I can not say just exactly whether the second or third, but the beginning
287 of March, we ran into a heavy gale, and two or three days later it subsided and the sea started running down.

Q. Can you refresh your recollection from this log as to the weather conditions you encountered during that period? A. Yes.

Mr. AXTELL. I object on the ground his recollection does not need refreshing.

The COURT. There is a little uncertainty as to the dates. You can look at the log.

Q. Turn to the entry under March 5. Does that refresh your recollection concerning the wind force between four and eight that night? A. Yes.

Q. What was the wind force blowing? A. On the afternoon of March 5?

Q. Between four and eight o'clock? A. From four to six, moderate to fresh breeze.

Q. And from six to eight? A. From six to eight the same thing, a fresh breeze.

Q. Is that a heavy wind? A. No; termed about 18 to 20 miles an hour, or 25, something like that, what we term it.

Q. What weather conditions did you have in the morning of that day? A. In the p. m.?

Q. No; in the morning. A. In the morning it was heavier; at four o'clock in the morning, you mean?

Q. No; from six o'clock—six a. m. March 5, to noon? A. Well, it was moderating down from about four to seven, moderate gale to a moderate breeze.

Q. Do you recollect the nature of the sea running at that time? A. It was north-northwest sea.

Q. Was it a high sea? A. No; it was a heavy swell, coming down from a gale of wind, running into a heavy swell.

Mr. LANDIS. That is all.

288 Cross-examination by Mr. AXTELL:

Q. How many days does it take you to get from Swansea to New York?

Mr. LANDIS. If your honor please, I object to that on the ground it is immaterial, irrelevant, and incompetent.

The COURT. This witness was not recalled on that.

Mr. AXTELL. This is all new matter. He did not go into this on his direct.

Mr. LANDIS. I have a right to recall my witness.

Mr. AXTELL. Then I have a right to cross-examine him. He said they had moderate weather, and I want to find out; I will be very brief.

The COURT. How many days from Swansea to New York?

Q. How long did the voyage last?

Mr. LANDIS. I object to that.

The COURT. I will let him answer.

The WITNESS. I will have to look up the log book.

Q. You know it was 28 days, don't you, without looking up? A. No.

Q. You will never forget that voyage, will you? A. A. Yes; I have had worse ones than that.

The COURT. I think you are all somewhat out of order. Next question.

Q. Mr. O'Connor, do you mean to tell me you don't know without looking at the log book how many days it took you to
289 cross the Atlantic on that trip? A. I have made so many trips across, Mr. Axtell, that I can not tell you, this voyage or the last voyage, or the other voyage.

Q. Do you remember the voyage when that wire got tangled up and took the cover off your fresh water tank and you put into Azores?

Mr. LANDIS. This is immaterial and has been ruled out.

Mr. AXTELL. I want to show there was a rough sea.

Mr. LANDIS. I object to that.

The COURT. Next question.

Q. Look at this log entry, the 15th, is that your own handwriting? A. As far as signing chief officer, yes.

Q. Is that correct, the one on the 15th, concerning Lustgarten? A. He didn't make that statement to me; that was made to the ship.

Q. The log entry, you signed it, didn't you? A. That might be made in Punta del Garda.

Q. That is your signature, isn't it? A. That is just a customary thing on the ship.

Q. Answer the question? A. That is my answer.

Q. And that is the captain's signature, isn't it? A. Yes, sir.

Mr. AXTELL. I want to read it.

Mr. LANDIS. Just a minute. Is this offered in evidence?

The COURT. You can not read it.

Mr. AXTELL. I offer that entry of March 15 in evidence.

Mr. LANDIS. No objection.

Mr. AXTELL. It reads: "March 15 Punta del Garda, Azores,
290 paid off B. Lustgarten, second cook, before U. S. consul, for medical treatment, Lustgarten claims that a lurch of the ship at sea on March 5 caused his chest to strike the rail, causing injury to his lungs."

Q. Now, is there any entry in this log about what he told you? A. I will have to look it over.

Q. As to how he got hurt, and his other sickness or whatever it was? A. I don't see any.

Q. How many days did it take you from Swansea to Punta del Garda? You left there February 28th, didn't you? A. Twelve days.

Q. What was the date of leaving?

The COURT. Leaving where?

Q. Leaving Swansea? A. On Wednesday, March 3.

Q. When did you get to Punta del Garda, the 15th? A. On the 15th.

Q. When did you reach Staten Island, New York? A. March 29th.

Q. How long—what is the speed of that boat ordinarily? A. About a 10-knot vessel.

Q. She crosses that distance ordinarily in about ten days, doesn't she? A. No, sir.

Mr. LANDIS. I object to this question.

The COURT. Objection sustained.

Q. You had rough weather the whole trip according to your log, didn't you? A. On and off, yes.

Q. You don't want the jury to infer that if the wind subsides, the sea immediately subsides also? A. Four hours later, it only takes four hours to run down, and four hours to come up.

291 Q. It depends on where it is, doesn't it? A. Not necessarily; no.

Q. It depends on where the ship is? A. Not necessarily.

Q. It depends on the direction of the wind, doesn't it? A. It depends on the velocity of the wind, not its direction.

Q. If you are off the coast of North America and the wind is from the shore and the wind subsides, the sea subsides very quickly, doesn't it? A. Not any more than the middle of the ocean.

Q. If the wind is coming from the sea and you are offshore, it takes a long time for the sea to subside, doesn't it? A. You don't have any sea, if the wind is coming from inshore.

(Witness excused.)

Dr. CLARENCE M. MCPEAK, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Doctor, what is your profession? A. Physician.

Q. Where are you practicing? A. At present in the University of Virginia Hospital.

Q. When did you graduate? A. In 1925.

Q. In 1925? A. Yes.

Q. Have you ever been stationed in the United States marine hospital at Staten Island. A. Yes.

Q. Have you ever had anything to do with Mr. Lustgarten, the plaintiff in this action? A. Yes.

292 What connection did you have with him? A. He was a patient on my ward in the marine hospital.

Q. At the marine hospital? A. Yes.

Q. Did you take this patient's history? A. Yes, sir.

Q. Do you recollect what Mr. Lustgarten's chief complaint was when he entered the marine hospital? A. The chief complaint was blindness in the left eye, or blindness in one eye, I don't remember which, and pain in the other.

Q. Did he complain at all about his chest and lungs? A. He complained some, he had pain in the chest.

Q. Any other complaint? A. He said he would spit up some blood at times, he said he lost 32 pounds in weight.

Q. He said he lost 32 pounds in weight? A. Since the accident.

Q. He remarked that accident to you, did he? A. Yes.

Q. Do you remember what he told you occurred? A. All I recall was that he said a wave hit him and knocked him against the rail.

Q. Do you recollect whether he said anything about a cough? A. He said he had a cough, but it came on only in the last few days, since he had a cold.

Q. He said that, did he, to you? A. Yes.

Q. How old did he tell you he was? A. Twenty-three.

Q. I hand you this record and ask you what it is [handing paper to witness]? A. That is a record of the patient Benjamin Lustgarten in the Marine Hospital No. 21.

Q. Would that refresh your recollection any? A. Yes, sir.

293 Q. In the event you don't remember exactly these things I am asking you? A. Yes.

Q. Did you treat this patient the entire time he was at the marine hospital? A. With the exception of possibly the last two or three days, I was sick myself.

Q. What treatment did you give him? A. As far as actual treatment, it was not much, mostly diagnosis.

Q. Did you make the diagnosis? A. Yes, sir.

Q. What diagnosis did you make? A. The diagnosis of malingering.

Q. How did you arrive at that diagnosis? A. His chief complaint, I diagnosed the eye; his chief complaint, I could not find anything myself, and had one of my consultants, Dr. Boland, see him, and he took him over to New York.

Mr. AXTELL. I object to what the other doctor did unless he was there at the time.

The WITNESS. I was not there.

Q. What else? A. The examination of the chest I did myself, and found out there was not anything wrong.

Q. Nothing wrong with his chest? A. I could not find anything wrong.

Q. What date did you make that examination? A. Made on the 6th day of April, that is the date he was admitted.

Q. Did you examine his chest at any other time? A. I don't think I did, he had an X-ray examination of the chest.

Adjourned until Friday, June 17, 1927, at 10.30 o'clock a. m.

294 NEW YORK, *June 17, 1927.*

Dr. CLARENCE N. MCPEAK, resumed the stand.

Mr. LANDIS. I am finished with the witness.

The COURT. Then he is your witness, Mr. Axtell.

Mr. AXTELL. And this is cross-examination.

Cross-examination by Mr. AXTELL:

Q. About how long have you been practicing, Doctor? A. Two years.

Q. Are you still associated with the marine hospital? A. No.

Q. How long were you over there? A. One year.

Q. One year? A. Yes.

Q. Where were you the year before that? A. I was in medical school the year before that.

Q. In which? A. The medical school.

Q. A little louder, Doctor. A. Medical school.

The COURT. Medical school.

Q. You have no impairment of speech, Doctor, have you? A. Not that I know of.

Mr. AXTELL. That is all.

(Witness excused.)

295 PETER BARTH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Mr. Barth, what is your occupation? A. Letter carrier.

Q. You carry letters in Brooklyn? A. Yes, sir.

Q. You are regular letter carrier of the United States mails? A. Yes, sir.

Q. Do you carry letters to 19 Thorpe Street, Brooklyn? A. 19 Throop Avenue.

Q. Throop Avenue? A. Yes.

Q. Do you recognize Mr. Lustgarten, the plaintiff, A. I do.

Q. Have you ever carried any letters or delivered any letters to Mr. Lustgarten at 19 Throop Avenue? A. Yes, sir.

Q. When have you done this? A. I delivered one, one letter at 19 Throop Avenue.

Q. What date was that, do you remember? A. On April 30th, on a Saturday.

Q. This year or last year? A. This year.

Q. Will you tell the jury what happened when you delivered that letter? A. Well, the letter was given to me to be delivered personally, and I entered the place and called the name, and a voice says "All right." I said "I must see Mr. Lustgarten," and the voice called, "Benny, Benny," and the door opened and Mr. Lustgarten came down the stairs and I handed him the letter, and I asked him if there was any such party with him. He looked at it and he said, "Lustgarten, that's my name," and he walked back.

Q. How was the light where this all took place? A. Well, it is not very dark and not very light, you know, about—I judge about the average tenement.

296 Q. Just about what? A. The average tenement house, old fashioned house.

Q. A hallway, is that it, an ordinary tenement house hallway light? A. Yes, sir.

Q. Did you look at this address and the name there; did you notice the script and the nature of the script? A. Well, Lustgarten's name was wrote in pencil.

Q. Written in pencil? A. Yes.

Q. Was it in big characters or small characters? A. About the regular writing, the average writing.

Q. Would you say it was easy to read or difficult to read? A. Not so very easy. It was not very easy to read.

Q. What? A. I say it was not very easy to read.

Q. It was rather difficult to read; is that the answer? A. It is; yes.

Q. Where did you hand Mr. Lustgarten this letter? A. What is that?

Q. Where was Mr. Lustgarten when you handed him this letter? A. He came down the stair. On the stair.

Q. How far down the stair was it? A. About half way.

Q. How did he come down the stair? A. I judge about six steps, something like that.

Q. How did he come down the stairs; in what manner or at what gate? A. He came down at a fast gate.

Q. Did he walk down slowly? A. No; he came down fast.

Q. He came running down? A. Yes, sir.

Q. Did he have any trouble; did he grope for this letter or did he receive it as anybody would receive it? A. He reached for the letter and looked at it, and said, "Lustgarten, that's my name." I did not notice anything.

Mr. LANDIS. That is all.

297 Cross-examination by Mr. AXTELL:

Q. Was that the first letter that you ever delivered to him personally? A. Yes, sir.

Q. Look at that letter and tell me if that is it [handing witness]? A. That was not the letter.

Q. What? A. That was not the letter.

Q. That wasn't it? A. No.

Q. How do you know so quickly that that wasn't it? A. Well, I know because it was not that name on there at all.

Q. What is that name on there? A. I will have to use my eyeglasses to see that.

Q. Well, supposing you look at it. A. "Benny Lustgarten, care of Axtell, 11 Moore Street, New York City." That was not the letter.

Q. You are looking at the address now, but what name is it? A. Lustgarten.

Q. You are sure that was not the letter? A. Exactly.

Q. Who is that letter from? A. I don't know who it was from. The boss gave it to me.

Q. Who is the boss? A. My superintendent.

Q. What is his name? A. Mr. Cunningham.

Q. Is he in the Post Office Department? A. Yes, sir.

Q. Did you ever go to 45 Broadway in your life? A. 45 Broadway? This place here? No, sir; this is the first time I have been here.

Q. This is not 45 Broadway. A. Oh, excuse me.

Q. Have you been down to this lawyer's office? A. It is the first time I have been here today.

Q. You have never been to his office? A. This is the first time today.

Q. You are sure of that? A. Yes, sir.

Q. You have never been to 45 Broadway? A. Never.

298 Q. Do you know who is there? A. I do not.

Q. Did you ever hear of the United States Shipping Board Emergency Fleet Corporation? A. That is the Government.

Q. You are working for the Government, too, are you not? A Yes, sir.

Q. Have you been there to their office? A. Only once, today.

Q. At the time that you delivered this letter did you know there was some particular reason for wanting you to deliver this letter to Lustgarten? A. I was told to see Mr. Lustgarten.

Q. Were you told to observe? A. Yes.

Q. And report what you observed? A. Yes.

Q. Did you or did you not, when you took the stand first, say substantially this: "I went up to the apartment"—I will withdraw that. Will you again tell me just what occurred when you went to the house. A. I entered the hall and called the name Lustgarten, and the voice called, "All right," and I said "I must see Mr. Lustgarten," and then the voice called "Benny, Benny," and a door opened and Mr. Lustgarten came down the stairs and I handed him the letter.

Q. And what? A. He looked at the letter and said, "Lustgarten, that's my name."

Q. And he went back? A. Yes, sir.

Q. How was he dressed? A. He was in his BVD's.

Q. That is right. Now you did not say anything then about running, did you, just now? A. No; he came down the stairs.

Q. You did not say anything about running just now, did you, and you did not say anything about running the first time you were questioned by the lawyer about it, did you? A. No, sir.

299 Q. And that was the truth; he just came down the stairs and got the letter and walked up again, didn't he? A. He came down the stairs.

Q. Then why did you say in answer to his question that he hurried and ran back up the stairs; why did you change your testimony? A. I did not say he ran back up the stairs.

Q. Have you been talking this over with somebody before you went on the stand to-day?

The COURT. Let him answer the question. What was your explanation, he did not say what?

The WITNESS. I say he did not run up the stairs. He came down the stairs fast.

Q. But you did not say that at first? A. Yes, I did.

Q. Have you been talking this over with anybody before you went on the stand? A. Yes; I was over it.

Q. Did you make a report of this occurrence to somebody? A. Just the way I reported it here.

Q. Did you report that letter incident to somebody afterwards, the manner in which—— A. (Interposing.) Oh, yes.

Q. To whom did you report it? A. Mr. Mayberry.

Q. Who is Mr. Mayberry? A. That is one of the officers from the United States Shipping Board, I believe.

Q. When did you make the report? A. Right after I gave him the letter, that same day.

Q. Then you did know you were going there to see if you could observe something? A. Yes.

Q. And make a report? A. Exactly.

Q. You were the regular mail man on that beat, were you not? A. Yes, sir.

300 Q. And you had gone there many times before? A. Never that house. Not there. I do not deliver any letters at that house.

Q. Oh, you are not the regular mail man on that beat? A. I am, but we do not deliver any letters at that entrance.

Q. Have you ever done this before? A. No, sir.

Q. For the defendant, in other cases? A. No, sir.

Q. Do you make a practice, as a postman, of acting as a detective for private corporations? A. No, sir.

Q. And have never done that in any other instance? A. No, sir.

Q. You did not know you were working for a private corporation in this instance, did you? A. Yes, I did.

Q. Then you knew when you went there that you were to try to get some evidence? A. I was told to deliver that letter and look at Mr. Lustgarten.

Q. And what were you paid for your services in that regard? A. Nothing.

Q. What do you expect for this extra service? A. Nothing.

Q. That does not come within your duties as a civil service employee of the United States? A. Nothing.

Q. You do not expect anything? A. No, sir.

Q. Do you expect promotion? A. No, sir.

Q. Do you expect to be recommended for promotion? A. No, sir.

Q. Who is the person who would recommend you for promotion or better pay or something, if such were to come your way? A. My superintendent.

Q. And who is the superintendent that sent you to this job? A. Mr. Cunningham.

Q. The same man? A. Yes.

(Witness excused.)

301 Dr. GRANT THORBURN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Dr. Thorburn, what is your profession? A. I am a physician.

Q. Have you a specialty? A. Yes, sir; I do tuberculosis work.

Q. You are a specialist in tuberculosis? A. Yes, sir.

Q. Where are your offices? A. 379 Park Avenue.

Q. Have you ever examined the plaintiff, Mr. Lustgarten, sitting over there [indicating]? A. Yes, sir.

Q. What did you examine him for? A. I examined him to—examined him particularly—a physical examination on him to find out whether or not I could find any evidence of pulmonary tuberculosis.

Q. Did you find any evidence of pulmonary tuberculosis? A. I did not.

Q. What connections have you with hospitals and other institutions of this city? A. I am on the staff of Bellevue Hospital, on the tuberculosis service, assistant attending physician; I am visiting physician at the Otisville Sanitorium; I am on the medical board of the Loomis Sanitorium, secretary of the medical board; I am on the medical board at Stonewall Sanitorium and one of the examiners for those sanitoria, and also the Trudeau Sanitorium at Saranac Lake. I am the consulting tuberculosis physician to the Rockland County Sanitorium at Summit Park, New York. Is that enough?

302 Q. Yes. How long have you practiced your profession, Doctor? A. I graduated in 1913.

Q. How long have you specialized in tuberculosis? A. Since the war in 1917. During the war and since then.

Q. How many examinations have you made of Mr. Lustgarten? A. I have examined him twice.

Q. What did your first examination consist of? A. I examined him with a stethoscope, examined his nose and throat, and I looked at him the first time.

Q. What was your conclusion after that examination? A. I was unable to find evidence of pulmonary tuberculosis. By that I mean a pulmonary tuberculosis which would give symptoms.

Q. However, you were not sure at that time; you were not able to make a definite diagnosis, by reason of the fact that you did not have a chance to examine him fully? A. That is right.

Q. When did that examination take place? A. The first one?

Q. Yes. A. Can I look at a card that I have here?

Q. Yes. A. I examined him first on the 4th of April.

Q. April 4th. When did you examine him again? A. I examined him again on the 12th of April.

Q. Both of those dates are in 1927, are they not? A. Yes, sir.

Q. Where did you examine him the second time? A. At the Post Graduate Hospital.

Q. And from this examination you arrived at the diagnosis that this man had not tuberculosis; is that right? A. As far as I could go at that time. He subsequently——

Q. (Interposing.) Oh, you—— A. (Interposing.) We took some further tests later.

303 Q. What other tests did you make? A. Took a pair of stereoscopic plates of his chest at the office.

Q. From that and various other examinations you arrived at the definite diagnosis? A. Yes, sir.

Q. That he has not pulmonary tuberculosis? A. ——

Cross-examination by Mr. AXTELL:

Q. What is the matter with him, Doctor? A. I don't know what is the matter with him.

Q. Well, is he perfectly healthy and normal and well? A. I do not think he is; no. Not if his——

Q. (Interposing). Doctor, if he was healthy and well and normal when he joined this ship in January, 1926, and had an accident on the 5th of March, by being struck by a sea and a heavy can falling on him full of ashes, bruised in the lungs and chest, that afterwards when he started to work spitting quite a quantity of blood, had a hemorrhage, as has been described by the witnesses, and then after that from time to time was spitting blood, lost weight, was in the condition that you saw him the other day—would you say that his changed condition was in any way connected with the accident—that is, assuming that it happened? A. You mean his changed condition is——

Q. (Interposing.) Yes, do you think the accident would have anything to do with his changed condition, assuming those facts to be true?

Mr. LANDIS. If your honor please, I object to this on the ground it is outside of the direct examination and outside the issues as brought up by direct examination. This hypothetical question deals with matters that I did not deal with in the direct examination.

304 Mr. AXTELL. I will risk making him my witness on that point, if your honor feels that this is outside the cross.

The COURT. I will sustain the objection unless you do.

Q. All right; will you answer the question, doctor? A. I have to have that question a little clearer. I do not know just what it is that you are trying to ask me.

Q. Well, is a trauma ever a competent producing cause of tuberculosis? A. It does not produce tuberculosis—trauma.

Q. Well, is it the exciting cause of activity of tuberculosis? A. It might be the exciting cause of a reactivation of chronic tuberculosis.

Q. The theory of tuberculosis commonly accepted is that the germ is—— A. (Interposing). The tubercle bacillus.

Q. Tubercle bacillus, is it? [Continuing:] Is in most people's mouths and lungs, isn't it; that is, that they get it in the mouth—— A. (Interposing). I would not say it is in most people's mouths but it is in most people's systems, and they take it in.

Q. Yes; and an injury to a knee joint sometimes results in a tubercular infection? A. Some authorities claim it does and other orthopedic authorities say it does not.

Q. What do you think about it? A. It has never been proved to my satisfaction that trauma developed tuberculosis. I am not an orthopedic; I do not do orthopedic work.

Q. You just specialize in—— A. (Interposing). Pulmonary tuberculosis.

Q. I see. Men do, you find in cases of autopsies performed,
305 find evidence of the tubercle bacillus in the lungs in the body of the person, do you not? A. Proof that he died of something else.

Q. Yes. A. We frequently do in a very large percentage of people.

Q. And the germ has made no headway and as a disease it has not progressed; that is true, isn't it? A. That is right.

Q. That is true with reasonable certainty of living human beings; probably a number of us in the court room—— A. (Interposing.) I think most of us have.

Q. In the lungs now? A. Yes.

Q. Would an injury to the lungs or the diaphragm or the tissues of the ribs be a competent producing cause of reduction of the vitality or resistance of the patient or person to such an extent as to permit the tubercle bacilli to become active and lead to tuberculosis? A. Yes.

Mr. AXTELL. That is all.

The COURT. May I suggest that that does not go far enough in this case, because I have ruled that the ship is not responsible for the injury. If you want to leave it there, all right.

Mr. AXTELL. I have made my case.

The COURT. All right.

Mr. AXTELL. He says there is no tuberculosis now.

Q. Is the treatment of a patient who is injured, after an injury to the lungs or the diaphragm or the pleura or other parts of the tissues about the lungs—is rest important in such cases? A. Is treatment following such an injury of importance? It is.

Q. I say rest. A. Why, certainly.

306 Q. And requiring violent exercise or substantially violent exercise, such as kneading bread, would not be good treatment for a man who had received such an injury, would it? A. I do not

think anybody would pick that out particularly as a form of treatment for anybody who had an injury.

Mr. AXTELL. That is all.

Redirect examination by Mr. LANDIS:

Q. Doctor, assuming that the plaintiff was struck by a wave and knocked unconscious and blood came from his mouth and nose in consequence of being knocked unconscious, or suppose that the man were ill, the illness being a vague illness, nobody knowing quite what it was, and that man were made to work for a period of two hours kneading bread, several days after this accident occurred or this illness first became known, would that cause tuberculosis, that kneading of bread, that working for two hours—would that be a cause of tuberculosis? A. It would not be a cause of tuberculosis.

Q. That is your definite opinion, that it would not cause—A. (Interposing.) It would not cause tuberculosis. You might make your question specific.

Recross-examination by Mr. AXTELL:

Q. It might lead to a sufficient deduction of resistance of the patient so that tuberculosis might develop, might it not? A. It might contribute.

Q. Yes; might aggravate it. You made X rays, I suppose, of this man? A. Yes, sir.

Q. Have you got them with you, Doctor? A. Yes, sir.

307 Q. You say they do not show tuberculosis on the date of April 7th? A. In my opinion they do not.

Q. Other doctors might have a different opinion from the same X rays? A. It depends entirely on the degree of experience, I think, of the doctor reading the X-ray plates.

Q. And it depends somewhat upon this history of the case and the slant that you get on it, does it not? A. We always take that into consideration in determining X-ray plates.

Q. You got a history in this case, I suppose, did you not? A. Yes, sir.

Q. You saw the history of the marine hospital? A. Yes, sir.

Q. This young Dr. Mac—something or other—McPeak? A. Yes.

Q. Who was of the opinion that this boy was a malingerer? A. I do not think I ever saw that.

Q. Oh, you did not see it? A. I do not remember it. I do not recall it.

Q. You were told that, were you not? A. I do not recall anybody said that, Mr. Axtell.

Q. It never occurred to you that he was a malingerer, did it? A. I don't know whether that occurred to me or not. What I had to work out was my——

Q. (Interposing.) That is all right.

The COURT. Doctor, you say that working for two hours might be the cause of tuberculosis. Do you say that any physician could say

with reasonable certain that it was the cause of tuberculosis, when after the man had spent a reasonable time in a hospital abroad and had returned to this country and was examined by physicians
308 and was found not only by you but by all others to have no symptoms or indications, either on X-ray or fluoroscopic examinations, that he was then suffering from tuberculosis—assuming those facts, would you say that any doctor would be justified in thereafter finding what he believed to be a condition of tuberculosis, that that working for two hours on board the ship was a competent producing cause of that tubercular condition?

Mr. AXTELL. May I interpose an objection, most respectfully, to your honor's question, on the ground that it is qualifying by one witness the testimony of another witness, and hearsay, and immaterial and irrelevant, on that ground.

The COURT. Well, I will ask you first, could you say with your knowledge of medical science, with reasonable certainty, that the working for two hours on board the ship was the cause of that tubercular condition?

The WITNESS. I could not.

The COURT. In your opinion would any other physician, skilled in medical science, make that statement with reasonable certainty? A. I do not see that he could.

The WITNESS. I do not see that he could.

The COURT. You may have your exception to the questions.

Recross-examination by Mr. AXTELL:

Q. Doctor, if there was some loss of blood due to the exertion of kneading bread, causing what was described by the witness as a hemorrhage, would that affect the case any? A. I can not
309 answer that in a generalized question like that. We have to take into consideration the amount of blood that was lost and the effect that it had on the particular patient at the time. A small amount of blood I should not think would have very much effect on him.

Q. Doctor, it would indicate that some kind of a lesion occurred, would it not? A. It would indicate the blood was getting into his sputum somewhere, certainly.

Q. It would indicate some kind of a lesion? A. A lesion somewheres in his mouth, nose or windpipe or lungs.

Q. And the loss of blood, if it continued afterwards, would tend to weaken the patient, would it not? A. That depends entirely upon the amount of blood. Yes, I think it would contribute to it.

Q. If the first hemorrhage occurred when he was working, doing this work which he was doing under compulsion, and hemorrhages continued thereafter, you would attribute——

The COURT. Until when?

Mr. AXTELL. Well, up to quite recently.

Q. You would attribute the hemorrhages to the compulsory work, would you not?

The COURT. There is no contention, Mr. Axtell, that this man was suffering from tuberculosis at the time your doctor first examined him, is there?

Mr. AXTELL. No.

The COURT. Then please put that statement in it.

Mr. AXTELL. I do not know why the court should——

310 The COURT. You may take your exception.

Mr. AXTELL [continuing]: Look after the defendants' interests.

The COURT. Proceed to your next question.

Mr. AXTELL. I certainly do take it.

The COURT. I think it is for the court to protect both interests.

Mr. AXTELL. I do not think this witness or this defendant needs any assistance except that of counsel.

The COURT. Next question.

Q. You did say, doctor, that the disease of tuberculosis develops as the result of a lowered resistance of the patient. Does it not? A. It develops sometimes as a result of lowered resistance. I think in order to make that point clear I might go a little further and say something about the way tuberculosis develops in the adult.

The COURT. You may do that.

The WITNESS. And manifests itself. It is commonly accepted by people working in tuberculosis that tuberculosis is taken in in very tiny doses, usually during the first seven to ten years of life. That is the way people gradually build up immunity against the disease later in life and maintain their health.

Q. An injury to one person—well, say the same injury to two different persons, may result in one instance in tuberculosis and in the other nothing; isn't that true? A. It might light up a latent tuberculosis in one person and not in another.

311 Q. If a person merely has the germs in his system, is that latent tuberculosis? A. We call a latent tuberculosis a tuberculosis that is present in the system without manifest symptoms. That is the kind of people we were talking about before, on post mortem showing they died of other conditions.

Mr. LANDIS. I do not believe these men can hear you back here.

The WITNESS. By latent tuberculosis we mean tuberculosis in the system that does not show any symptoms and is sealed up.

Q. I think I am a fairly healthy specimen. It is possible that I might have them? A. There are some of the glands on the roots of your lungs. Very possible.

Q. An injury to my lungs or a blow in a boxing bout, or something, probably would not start up a tuberculosis would it? A. I should not think so.

Q. But if you take a thin, anaemic undernourished person, could the same blow with the same symptoms in his system start up tuberculosis? A. It might light up tuberculosis; that is possible.

Q. Would you say in both instances both persons were suffering from a latent condition of tuberculosis before the blow was struck?

A. Well, we call a latent tuberculosis also; further than that, a tuberculosis in which although no symptoms are developed there are usually some X-ray evidences, according to Opi, of small healed lesions. Opi is one of the best men we have in the country on immunology.

Q. Is it a common accepted theory that tuberculosis develops where the resistance of the patient is lowered? A. In that part of the body where the resistance is lowered?

312 Q. Yes. A. Yes, I think so.

Q. That is fundamental; you do not have to think about that, do you, doctor?

The COURT. Mr. Axtell, proceed, please, without comment.

A. No, I have to think of it.

Q. Was it because you wanted to see the effect of your answer, or because you hesitate about knowing what the answer was. A. Because I wanted to tell you exactly the truth.

Q. Wasn't it because you wanted to be sure what the effect of your answer would be? A. It had nothing to do with it.

Q. You were looking for the next question. A. I was not.

Q. All right. Lowered resistance of a patient does encourage the disease of tuberculosis, whether that resistance is lowered in a locality or generally, doesn't it? A. Yes.

The COURT. Does that assume, doctor, that the man already has it?

The WITNESS. That the man has a tuberculosis, a latent tuberculosis in his system. It may contribute to the lighting up of the disease, your honor.

The COURT. Then if he stays up late at night, that also would do it?

The WITNESS. That could do it, too.

The COURT. It would tend to aggravate the condition?

The WITNESS. Yes, sir.

Q. Does the loss of blood lower the resistance? A. I just said it did.

313 Q. And might in a man who has sustained a severe strain, the exertion of kneading bread, be a competent producing cause of creating a lesion in the lungs that would produce a loss of blood? A. I said that it might contribute to it.

Q. Yes or no. A. Yes.

Q. It might be the cause of the lesion that would produce the hemorrhage, might it not? A. It might contribute to it.

Redirect examination by Mr. LANDIS:

Q. Doctor, did Mr. Lustgarten tell you how often he had been spitting up blood? A. Yes, sir.

Q. What is your conclusion from his statement? A. I am unable to find objective findings which would lead me to believe that his spitting up all this large amount of blood—I mean I am unable to find objective findings commensurate with subjective symptoms, if that is clear.

(Witness excused.)

Mr. LANDIS. If your honor please, I renew my motions to dismiss the second cause of action on the ground that the plaintiff has not succeeded in making out the second cause of action.

The COURT. I will deny that motion.

Mr. LANDIS. Exception. If your honor please, I move that the second cause of action be stricken out because it has not been established by the plaintiff that either of the defendants in this action is connected with the steamship on which this plaintiff was employed except as agents.

The COURT. Motion denied.

314 Mr. LANDIS. Exception. Now, if your honor please, I move that the court to direct the jury to return a verdict for defendants in this case.

The COURT. Motion denied.

Mr. LANDIS. Exception.

Mr. Landis summed up to the jury on behalf of the defendants.

Mr. Axtell summed up to the jury on behalf of the plaintiff.

Charge to jury

The COURT (Thacher, J.): Gentlemen of the jury, you are performing a very important function and you have a delicate duty to perform, one of great importance and one which can not be delegated. You men are not to be governed by your feelings or by your emotions. It is my duty in this case and in every case to caution the members of the jury against the appeals which are made to their sympathies by counsel for plaintiffs. Perhaps through defects in the law itself it is the law that as jurymen you should follow your oath and not decide cases on grounds of sympathy.

This case is one which appeals deeply to the sympathy of every man who is brought into contact with the life of this plaintiff. Nevertheless it has been my duty to restrict your consideration of the issues here because the law says I must, as I understand the law. I should much prefer, as each one of you, to say to you gentlemen this is a poor man, he leaves this room a wreck unless you and I provide for him. That is an emotional appeal. It is my duty to restrict your consideration to those questions which the law, as it is established, provides as a basis of possible liability in this case.

315 Consider for a moment the effect of your disregard of that duty, which is squarely imposed upon you as it is upon me. The case has been tried. I have ruled as a matter of law that the ship, so far as the occurrence of the accident was concerned, was not at fault and is not liable. The plaintiff has his exception taken to that ruling. He may review that ruling of law and it may be taken to a higher court and the ruling reversed. Personally, I should be glad to see it taken there. If you gentlemen in your consideration should undertake after that ruling has been made to allow a recovery of damages on any such theory, though the plaintiff may appeal the question of law and reverse the judge and have another

recovery, you have already in your consideration allowed something to which he was not entitled.

So you come when you analyze the situation to see that it is your duty in fairness to him to decide this question upon the theory upon which I feel, rightly or wrongly, it must be submitted to you. For if you do not, you deprive the defendant of the right which he has to have those questions reviewed in a higher court; whereas upon those questions which are submitted to you for your decision as questions of fact, you gentlemen are the final judges, your decision will never be reviewed in any court, and if you undertake to decide questions which are not within your province there will never be a review by the defendant of your decision and no court can dispute it.

So, if we are here in the interest of justice, you gentlemen must take this case as the court submits it to you, whatever you may think of the law as I state it. And that brings us to the only ques-
316 tion in the case. Where a seaman is employed upon a ship the law has always imposed upon the ship and her owners—in this case the suit is against the owners or those who were operating the ship—the duty of taking care of the man when he is sick or when he is injured. If he falls sick or has an accident, there is that affirmative duty. It can not be delegated from one man on board the vessel to another. The defense has suggested that to support recovery by the plaintiff the captain must have known of this man's condition if you find that he ordered him out on deck. But if any other responsible officer knew of it, that knowledge would be equally binding as the captain's own personal knowledge.

There was a duty of the man to report his condition to his superiors. But once that report was made, whatever superior ordered him, contrary to what was the care that he was entitled to, to go to work, whether that superior happened to know what he told the second officer would not make any difference. As soon as he reported the fact that he was sick, then the obligation arose and continued to care for that man in his illness.

That is the only question. He says that he was cruelly and brutally ordered to work over his own protest, when he was unable and unfit to work. He says, furthermore, that when he was at work, I think it was the second officer Abbott came to him in the galley and expressed surprise, and said, "Why, Lustgarten, what are you doing here, you ought to be in bed." And Lustgarten told him that the captain had ordered him to work, and Abbott said, "Well, come up on the bridge and see the captain." That then they went to the bridge and the captain said he did not care how sick he was,
317 this man had to go to work. If you believe that story, gentlemen, that is the most outrageous, brutal, cruel violation of the duty which was upon the ship and its officers in that situation that could be well conceived of.

On the other side of that issue, you saw the second officer Abbott; you judged him as a man. He is apparently disinterested. You heard the deposition of the captain. The stories are absolutely ir-

reconcilible. One is a picture of consideration and full performance of the duty which was imposed; the other is a brutal, inhuman disregard of that duty. It is your function as gentlemen of the jury, as the sole judges of the facts, to determine where the truth lies between those two stories.

If you find there was no breach of that duty to properly care for that man after he was injured, it will be your duty under your oaths to find a verdict for the defendant. Whatever you may think about anything else in the case, that is the only road you can follow. The first question is whether that duty was neglected or was performed. If not neglected, you must find for the defendant. Assuming your finding is the other way, then the question is what effect did that amount of work—two hours, I think the plaintiff said—in the galley have upon this man.

It is claimed by the plaintiff that it was the cause of his consumption, which he claims he suffers from at this time, and that rests solely upon the testimony of the physician called by the plaintiff who said that in his opinion he could state with reasonable certainty on the facts which were assumed in the question that the plaintiff's work for two hours on board that ship on that particular day was the cause of the tuberculosis from which he says he suffers.

318 In passing I might explain to you that the other doctor called by the plaintiff testified, as you will recall, that that period of work could have had nothing to do with the man's sight, and it was upon that statement that I told you at the time that the condition of his eyes would necessarily be excluded from your consideration. Had the plaintiff established the fault or a basis for your finding of fault with regard to the accident itself, it would have been my duty to submit to you the question whether the condition of his eyes had resulted from the accident. But the doctor having told you that it could not have resulted from the order to go to work, then that was necessarily removed from the case. So that you must give no consideration whatsoever to his sight.

Dr. Powers said that he could state with reasonable certainty that the two hours' work resulted in tuberculosis. The testimony of every expert witness may be given as much or as little weight as the jury thinks it is entitled to receive, and you must judge that conclusion of Dr. Powers as rational and reasonable men, aided with his knowledge and the knowledge of the other doctor in regard to the disease of tuberculosis, and reach a rational conclusion as to whether you can say or you believe the doctor with reasonable certainty could have said—but it is your final say—whether you can say and are satisfied that those two hours of work resulted in this man contracting or having tuberculosis.

Dr. Powers frankly admits that when the man was first examined he had no evidence whatsoever of suffering from tuberculosis. There was nothing on the X-ray plates, there was nothing in the fluoroscopic examination, there was nothing in his examination of

319 the man's body or sputum which suggested that at that time several weeks or months, you will recall the period, after

e accident, that the man had any signs of tuberculosis. Notithstanding his positive assertion to that effect, he tells you at by reason of what was described as happening at the time of e accident he can state and does state that in his opinion the stayg at work was the cause of the man's contracting tuberculosis. ou are to judge his conclusion rationally, accept it or reject it, as u determine is right.

Your verdict must not be based in any event upon guesswork or eculation. There were many questions asked of both doctors as what might or might not result from this or that. Such testiony is no proper basis for any finding of fact upon your part. It necessary in order to justify a judgment against one man in favor another that the facts upon which it is based are established by preponderance of the evidence, and to your satisfaction as rational man beings and thinking men. And you must not base your findg upon guesswork or speculation.

Gentlemen of the jury, the burden is upon the plaintiff to satisfy u that he is entitled to recover on the principles I have stated you, by a fair preponderance of the evidence. You are to judge e evidence as you judge people, as you meet them from day to y, as they tell you this and that. We are sometimes mistaken, but ost often right in our judgment of the men we meet. Take the pearance of the men on the stand and decide on your own impresons whether they are telling the truth, and decide this case on the idence and in accordance with your oaths as jurors, so that justice ay be done.

Are there any exceptions?

0 Mr. AXTELL. The plaintiff excepts as follows: Excepts to the comments of the court as to evidence, the characterization evidence, relating to and giving undue weight to certain parts of e evidence, by mentioning it specifically, and by failure to mention her evidence particularly which results in giving, as I recall it, an tirely different version of plaintiff's claim than that which was ade.

The COURT. Mr. Axtell, you may indicate your exceptions. I do t wish you to argue the case at this time.

Mr. AXTELL. That is what I am trying to do.

The COURT. You may refer to those portions.

Mr AXTELL. I except to your suggestion. I except to that part the charge where your honor referred to the occurrence on the idge.

The COURT. I will allow you an exception to the charge as a whole.

Mr. AXTELL. On the ground that it is unfair and biased.

The COURT. On any ground that you wish to state.

Mr. AXTELL. All right. I ask your honor to charge the jury they e the sole judges of the facts in this case.

The COURT. I have so charged the jury.

Mr. AXTELL. I ask you to charge the jury that the court has no terest whatsoever in the determination of the result of this case,

and that they will not incur the court's displeasure if they find a verdict plainly contrary to the court's expressed opinion of the facts.

The COURT. That is quite absurd, gentlemen, to imagine anything else. I have no interest in the case, and you have none. You may retire.

321 Mr. LANDIS. If your honor please, may I ask for one instruction. Will your honor charge that if the jury find that the plaintiff has not pulmonary tuberculosis, then they must find a verdict for the defendant.

The COURT. I refuse to so charge, because, gentlemen, even if you find that he had not pulmonary tuberculosis, the mere suffering of the man during the time that he was at work, if that was caused by a wrongful order and disregard of the duty imposed upon the ship—that in itself might be the basis for an award of damages to compensate him for that suffering, and for any other suffering that you gentlemen upon all the facts and circumstances in this case find he may have had or damage that he may have incurred as the result of the wrongful order, if you find the wrongful order was given.

Mr. LANDIS. May I except to your honor's refusal to charge.

The COURT. You may.

Mr. LANDIS. And may I except to that part of your charge which states that the jury has a right to return a verdict for any suffering that the plaintiff might have had as the consequence of doing what he did in those two hours.

Mr. AXTELL. If your honor please, I ask your honor to charge the jury that if their recollection of the facts is that Dr. Power examined him on the 6th of April, 1926, some thirty days after his injury, and that at that time he found no positive evidence of tuberculosis, that is not, in view of the explanation of the experts as to the development of the disease, to be taken as an inference that he did not or had not incurred an injury that later resulted in it.

322 The COURT. Gentlemen, from all of the facts and from all of the testimony it is for your recollection and determination. You take the whole case. We would be here all day if we were to suggest this, that and the other thing. Your recollection is controlling. You are the sole judges. You must not guess or speculate how I would find or be governed by that, because it is solely your responsibility.

JUROR No. 12. I would like to hear that part of the testimony where he said he only had to work two hours.

The COURT. I will ask the jurors to retire and commence their deliberations. If in those deliberations it is necessary to have any of the testimony read, your foreman will indicate and you will be brought back to the court. Your recollection may be refreshed by the others.

(The jury then retired at 12.12 o'clock p. m.)

RECESS

(At 2.35 p. m. the jury returned.)

The CLERK. Mr. Foreman, have you agreed upon a verdict?

The FOREMAN. We have.

The CLERK. How say you?

The FOREMAN. We find for the plaintiff for the sum of $10,000.

The CLERK. Gentlemen of the jury, listen to your verdict as it stands recorded: You say you find a verdict for the plaintiff for $10,000, and so say you all?

The FOREMAN. Yes.

Mr. LANDIS. If your honor please, I move that the verdict be set aside as contrary to law and contrary to the evidence and contrary to the weight of the evidence, and on all the other grounds set
323 forth in the appropriate section of the civil practice act except on the ground that the verdict is insufficient; and on the further ground that the verdict is excessive.

The COURT. Motion denied.

Mr. LANDIS. May I have an exception?

The COURT. Yes.

324 In United States District Court

[Title omitted.]

Stipulation settling bill of exceptions

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true bill of exceptions, containing all the evidence introduced at the trial of this action, all the objections, and exceptions made during the trial of this action and that the *the* same may be settled and allowed, signed and certified, and made a part of the record in this case.

Dated, New York, October 26th, 1927.

SILAS B. AXTELL,
Attorney for Plaintiff.
CHARLES H. TUTTLE,
United States Attorney.
EDGAR G. WANDLESS,
Attorneys for Defendants.

325 In United States District Court

[Title omitted.]

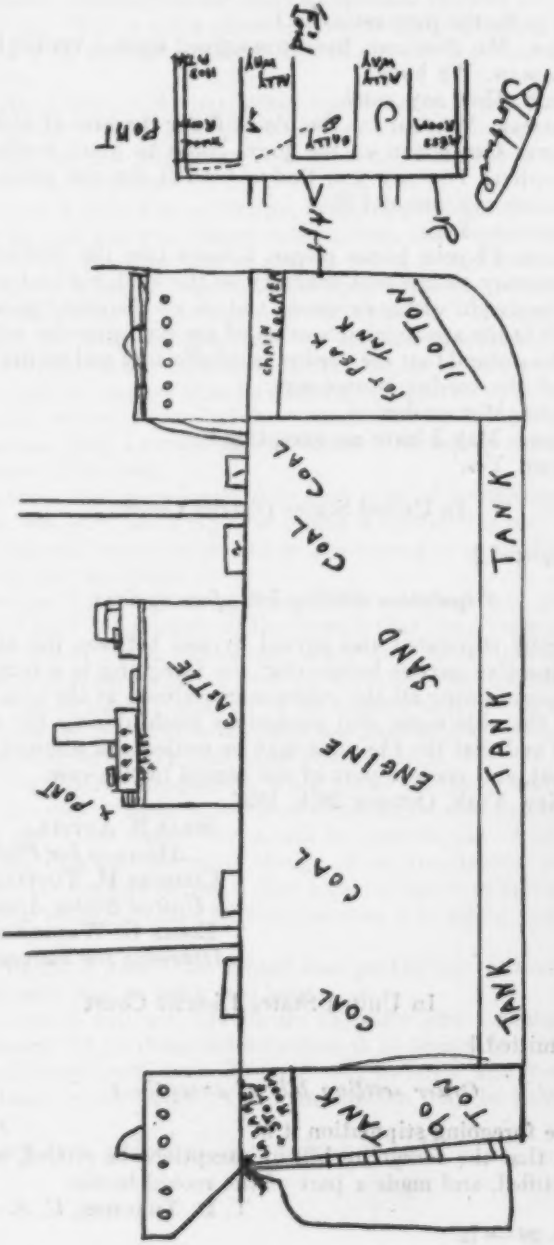
Order settling bill of exceptions

Upon the foregoing stipulation it is

Ordered that the foregoing bill of exceptions be settled, allowed, signed, certified, and made a part of the record herein.

T. D. THACHER, *U. S. D. J.*

326 *Plaintiff's Exhibit 1*



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320 *Plaintiff's Exhibit 4*

"Operating Agreement, 1924" 17459—24

United States Shipping Board, represented by Emergency Fleet Corporation United States Shipping Board, Washington

AGENCY AGREEMENT FOR MANAGING AND OPERATING VESSELS

This agreement made in duplicate the 1st day of May, 1924, between the United States of America, hereinafter designated as the owner, acting through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, hereinafter called the agent, witnesseth:

1. Appointment of agent.—The owner appoints the agent as its agent to manage, operate, and conduct the business of such vessel as it has assigned or may assign to the agent under the supervision of the owner at all times.

2. Agent's acceptance of appointment.—The agent agrees to act as such agent and to manage, operate, and conduct the business of such vessels in accordance with the directions, orders, and regulations which the owner may from time to time prescribe.

330 3. Manning, equipping, etc., vessels and paying disbursements.—The agent agrees to man, equip, victual, and supply such vessels, subject to such restrictions and in such manner as the owner may prescribe, and to pay for account of the owner the cost thereof and all other costs and expenses incident to the management, operation, and conduct of business of such vessel as the agent may from time to time be directed by the owner.

4. Maintenance and repairs.—The agent shall, subject to such regulation or methods of supervision and inspection as may be required by the owner, exercise reasonable care to maintain the vessel in a thoroughly efficient state in hull, machinery, tackle, apparel, furniture, and equipment, procuring the necessary labor and material to effect ordinary running repairs and replacements. No extraordinary repairs or expenses of any kind shall be made or incurred and no alterations in hull, machinery, or equipment shall be made by the agent, except in cases of serious emergency, without first securing in writing the authorization of the owner. All such expenses properly incurred in connection herewith shall be for the account of the owner.

5. Agent must use care to avoid all damage and loss.—The agent agrees to exercise reasonable care to protect and safeguard the interests of the owner in all respects, and to exercise reasonable care to avoid loss and damage of every nature to the owner.

6. Trades, bills of lading, etc.—The agent shall be subject to the orders of the owners and its authorized representatives as to voyage, charters, rates of freight, and other charges and as to
331 all other matters connected with the agency aforesaid, and shall cause to be issued to shippers customary charter parties, contracts of affreightment, and bills of lading. All such bills of lading shall be in the form now adopted and approved or in the form which may hereafter be adopted and approved by the owner.

7. Subagents.—The selection by the agent of agents or subagents shall be subject to disapproval by the owner. The agent shall be responsible to the owner in all respects for the acts of any subagent selected by him, and such subagents shall not be in any respect the agents of the owner but solely the agents of the said agent.

8. Collection of money.—The agent agrees to collect when due all freight and other moneys accruing to the owner arising out of the management, operation, and business of the vessels, and, in the event of the failure of any charterer, shipper, or other debtor of the owner, to pay promptly such moneys, to immediately notify the proper officer of the owner, and in the meanwhile take such steps as may be proper to protect the owner's interests. The agent further agrees to do all things which the owner is required by law or custom to do either as owner of the vessels or as carrier of the cargo. All credit granted by the agent, without the express approval of the owner, will be at the agent's risk.

9. Handling of moneys.—The agent agrees to deposit all moneys collected on behalf of the owner in a national bank or bank which is a member of the United States Federal Reserve Associa-
332 tion or such other bank as may be approved by the owner as a separate fund in the name of the United States Shipping Board Emergency Fleet Corporation, which money shall, in so far as the agent is concerned, be the property of the owner, and drawn upon only as directed by the owner; and whenever the treasurer of the Fleet Corporation considers the public interest demands they shall be subject to check by him as well as by the agent. The agent shall, at such times and in such form as may be directed by the owners, render a full account of all moneys received and disbursed. Only items supported by proper vouchers or accountings will be allowed in settlement with the agent.

10. Accounting and auditing.—The agent shall keep separate books of account in such manner and form as may be prescribed or approved by the owner, devoted exclusively to the agency business with the owner, which books, together with all vouchers, accounts, papers, or other documents, shall at all times be subject to the inspection and audit of the owner; and the owner may at any time temporarily take possession of the same to make a complete audit; and, in case the agency is terminated, may retain possession of such books and papers as it may deem advisable. The agent shall furnish statements and reports when called for by the owner, and in the form prescribed by

the owner, and shall generally conform its accounting to the directions of the owner.

11. Compensation.—The owner shall pay to the agent as full compensation for the agent's services the commissions and fees specified hereunder as follows:

333 (a) From United States and Canadian ports.—Seven and one-half per cent on gross outward ocean freight, dead freight, demurrage, express, and mail revenue earned by the vessel; Provided, That 3¾ per cent only shall be paid on coal, sulphur, phosphate, and grain in bulk, in case any one of these commodities constitutes more than 60 per cent of the payable tons of the vessels, total outward cargo, regardless of the number of ports of loading or discharge, and regardless of the number of bills of lading, or consignees; And provided further, that 3¾ per cent only shall be paid on full cargoes of other commodities shipped by one shipper to one consignee, from one port of loading to one port of discharge, to be accepted and delivered by the ship without count or marks.

(b) Into United States and Canadian ports.—Three per cent on gross inward ocean freight, dead freight, demurrage, express, and mail revenues earned by the vessel.

(c) Between other than United States and Canadian ports.—Three and three-fourths per cent on gross ocean freight, dead freight, demurrage, express, and mail revenue earned by the vessel.

(d) Passenger revenue.—Seven and one-half per cent shall be paid on gross passenger and excess-baggage revenue derived from carrying passengers on cargo vessels.

(e) Salvage.—Five per cent of all salvage earned for account of the vessel after deducting crew's proportion for salvage services rendered to vessels not owner or controlled by the owner, and 2½ per cent on all salvage earned for account of the vessel after 334 deducting crew's proportion for salvage services rendered to vessels of the owner. The amount of salvage awards for such last-named services shall be determined by the owner, and all negotiations for settlements of other salvage claims shall be in the control of the owner.

(f) The commissions provided for above upon dead freight, demurrage, and salvage shall be paid only on revenue actually collected. Final control over the compromise, settlement, or waiver of disputed claims for dead freight, demurrage, salvage, etc., shall be with the owner.

In consideration of the compensation provided above, the agent hereby agrees that he will assume and pay for his own account the costs and expenses enumerated hereunder:

(a) Costs of furnishing and preparing all cargo and shipping documents, including labels, tags, etc.

(b) All administrative and general expenses of every nature, including traveling expenses of his employees, and including telephones, telegrams, cables, postage, and petties.

(c) All agency fees and commissions payable to subagents of the agent in United States and Canadian ports.

12. Brokerage.—Freight, passenger, and charter brokerage, in cases where it is necessary and properly incurred to secure cargoes, passengers, or charters in accordance with the custom of the trade, shall be for account of the owner, whose decision shall be final.

12a. Commissions and fees.—The owner shall assume and pay, except as is otherwise provided herein, the customary fees and
336 commissions for agency services rendered at foreign ports, such fees and commissions to be subject to the approval of the owner.

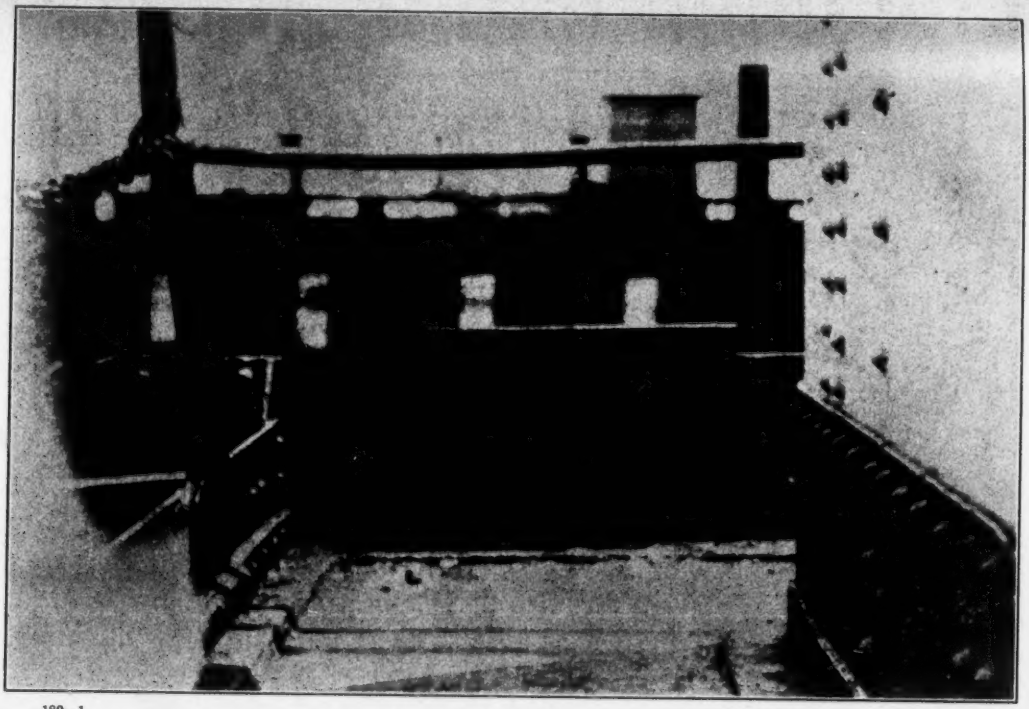
13. Use of each other's contracts by the owner and agent.—The owner shall, when it may legally do so, have the advantage of any existing, or future, contracts of the agent for the purchase of materials, fuel, supplies, or equipment, provided this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the agent. In every case where the owner shall contract or shall have contracted for materials, fuel, supplies, equipment, or services, such as those of the United States Salvage Association, or other similar services, the agent shall procure the same in pursuance of such contract and shall pay for the same in accordance with the directions of the owner: *Provided*, That when necessary to avoid undue delay to vessels, the agent may, subject to the owner's approval first obtained, procure materials, fuel, supplies, equipment, or services from other sources at lowest obtainable costs. The agent in such cases shall support its disbursements with satisfactory explanation to the owner.

14. General average.—In case of general average, the agent agrees to appoint an adjuster, approved by the owner, and to assist the adjuster in preparing the average account, to take proper security for the cargo's proportion of average, and to assert liens and to take all other possible measures to protect the interests of the owner. For such services the agent shall receive the customary fee, the
336 amount of which will be determined jointly by the agent and the adjuster, subject to the approval of the owner.

15. Bond.—The agent agrees, whenever required by the owner, to furnish a bond satisfactory to the owner for the faithful performance of the agent's duties and obligations hereunder.

16. Termination of agency.—(a) The owner shall have the right at any time to terminate this agreement as to any and all vessels assigned to the agent and to assume control forthwith of any or all of said vessels, and to collect directly all freight moneys or other debts remaining unpaid.

(b) Upon giving the owner 30 days' written notice, the agent shall have the right to terminate this agreement, such termination not to become effective as to any vessel until its arrival and discharge at a United States port.



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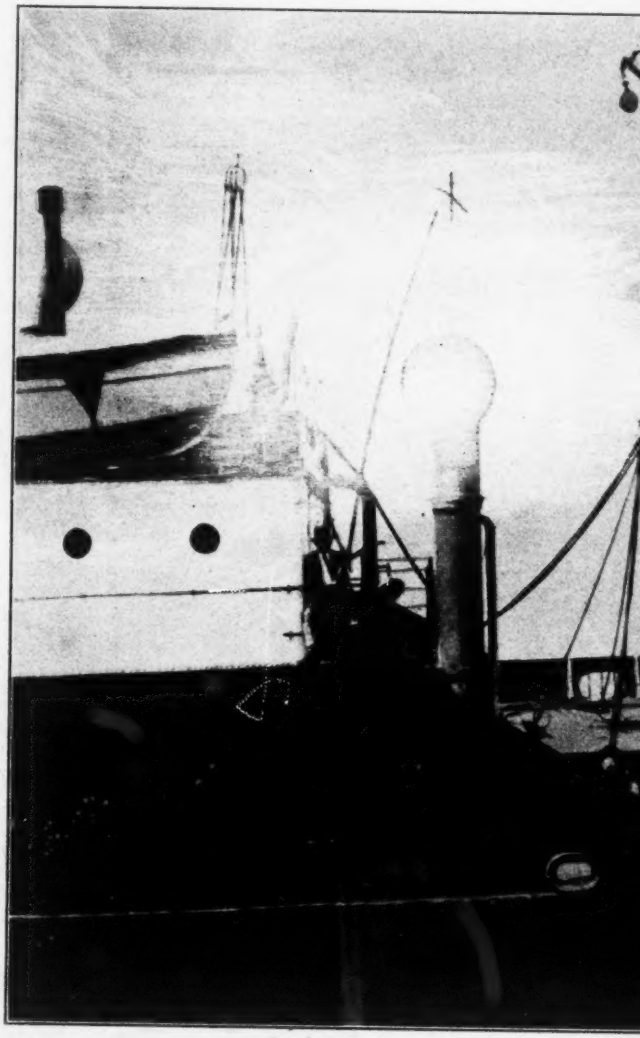

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In case of termination under either (a) or (b), the agent, shall, if required by the owner, adjust, settle, and liquidate the current business of the vessels.

17. Trade name.—The trade name under which a line or route is operated with vessels of the owner shall be subject to the approval of the owner, and shall not contain the name of the agent, and such trade name shall remain the property of the owner.

18. Certain profits prohibited.—It is understood and agreed that any agent receiving directly or indirectly any profit or benefit from any services rendered or supplies furnished to vessels of the owner operated by the agent shall account for and pay such profits
337 to the owner. The agent as representative of the owner is not permitted to trade with any individual, firm, or corporation, where he may have an interest except first with the written approval of the owner.

19. Foreign flag vessels.—Except with the specific approval of the owner, the agent shall not be permitted to operate either as agent, owner, or charterer foreign flag vessels competing with lines operated by or for the United States Shipping Board.

20. Readjustment of commission.—If at any time during the continuance of this agreement the compensation to the agent, by reason of changed conditions or for any other cause, should appear to the board to be unjust either to the owner or to the agent, it shall be subject to readjustment after consultation between the parties, and the decision shall be final.

21. Interpretation of agreement.—Any question arising under this agreement shall be referred to the United States Shipping Board for determination, and its decision shall be final.

In witness whereof the parties hereto have executed this contract in duplicate the day and year first above written.

UNITED STATES OF AMERICA,
By UNITED STATES SHIPPING BOARD
By UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION.

By (sgd.) L. C. PALMER, *President.*

338 Attest:
(Sgd.) CARL P. KREMER,
Secretary.

CONSOLIDATED NAVIGATION COMPANY,

By (sgd.) L. C. PALMER, *President.*

Attest:
(Sgd.) W. D. PRITCHARD, *Secretary.*

Approved as to form:
(Sgd.) STEPHEN BARKER,
Assistant to General Counsel.

341 *Exhibit A*

AFFIDAVIT OF BENJAMIN LUSTGARTEN

PORTUGAL, AZORES ISLANDS, ISLAND OF ST. MICHAEL, CONSULATE OF THE UNITED STATES OF AMERICA, *ss.:*

Before me the undersigned, William F. Doty, consul of the United States of America, appeared Benjamin Lustgarten, well known to me and being duly sworn deposed and said:

I was an A. B. seaman on board the United States Shipping Board S/S "Coelleda," of which William H. Lee was master, and when at sea about one day and a half from Swansea on the voyage toward New York I was on duty. I was going to dump a can of ashes. There was a very heavy sea running but there was no lee side because the wind and sea were right ahead. The ship had a very bad leak and the after peak tank could not be emptied because the pipe line was full of lines and dirt. They took a pump out of the engine room and set it on deck, but the water was coming in just as fast as they were pumping it out, and with water in the after peak and storeroom the ship's stern was way under the water, which made the ship like a log on the water. The ship could not be steered; she was always drifting 20 to 40 degrees off her course. I was going to dump the ashes, when all of a sudden the ship came over with a heavy list to port, bringing with it a heavy green sea which landed right on my back pressing my chest up against the rail knocking me unconscious. Mr. Graft picked me up and brought me into the hospital where he said I was unconscious for three hours. When I came to myself the captain was standing there and he said, "Come on now, get up and go to work." I was still dazed by the blow
342 but fell down when I stood up. I lay in bed two days, then the captain came once more and said, "You will have to go to work because I am short handed," so I said to him, "Captain, you are doing this at your own risk because I am too weak to go to work." But he said, "That's enough out of you, young man." That day I had my first attack of overflow blood coming out of nose and mouth and on the 8th day of March I had five straight attacks in which I think I lost two pints of blood. The captain said I had the tuberculosis but I told him he was wrong. The only thing they had in the medicine chest was Epsom salts and not very much of that. The ship just having come out of the lay-up fleet was not prepared to cross the North Atlantic in March which any skipper that has had any experience at all will tell you. The captain kept on saying, give him another dose of salts, but Mr. Abbott, 2nd officer, said, captain, you will kill him if you keep giving him Epsom salts. The captain said, "That is what I want to do." Thereafter the captain would not have anything to do about treating me. Every day after that I had from one to five attacks, leaving me very weak. The following five men saw me get hit by the wave: Mr. Graft, A. B. seaman; Mr. Mullen,

water tender; the boatswain; the chief cook; J. Burns, A. B. seaman; and R. Abbott, 2nd officer.

BENJAMIN LUSTGARTEN.

Sworn and subscribed before me this 22nd day of March, 1926.
Witness my hand and seal of office at St. Michael's, Azores.
Service no. 297.
No fee prescribed.

W. F. DOTY,
Consulate of the United States of America.

343 In United States District Court,

[Title omitted.]

Stipulation as to exhibits

It is stipulated and agreed by and between the attorneys for the respective parties hereto that all the exhibits introduced at the trial of this action by the parties herein shall be reproduced in the printed record on appeal except defendants' Exhibits B & C, which need not be reproduced but which may be used on the argument of the appeal by any of the parties.

Dated, New York, N. Y., October 4, 1927.

SILAS B. AXTELL,
Attorney for Plaintiff.

CHARLES H. TUTTLE,
Attorney for Defendant, U. S. S. B. E. F. C.

IRVING L. EVANS,
Attorney for Defendant,
Consolidated Navigation Co., Inc.

344 In United States District Court,

[Title omitted.]

Petition for writ of error

And now comes the defendants herein, United States Shipping Board Emergency Fleet Corporation, by Charles H. Tuttle, United States attorney and the Consolidated Navigation Company, Inc., by Edgar G. Wandless, its attorney, and feeling themselves aggrieved by the final judgment of this court entered against them and in favor of the plaintiff on the 22d day of July, 1927, defendants hereby pray that a writ of error be allowed to them from the United States Circuit Court of Appeals for the Second Circuit to the District Court of the United States for the Southern District of New York,

and in Connection with this petition, petitioner hereby presents its assignments of error.

Dated, New York, N. Y., October 5th, 1927.

CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendant, United States Shipping Board Emergency Fleet Corporation.

EDGAR G. WANDLESS,
Attorney for Defendant,
Consolidated Navigation Company.

Office & Post Office Address, 45 Broadway, Borough of Manhattan. City of New York.

345 In United States District Court

[Title omitted.]

Assignments of error

The defendants above named, by their attorneys, Charles H. Tuttle, United States attorney, and Edgar G. Wandless, assign error in the final judgment entered in this case July 22, 1927, in that the learned trial judge erred as follows:

First. In denying defendants' motion to dismiss the second cause of action alleged in the complaint at the time that the court first called for motions just prior to the end of the plaintiff's case and in denying defendants' motion to dismiss the second cause of action contained in the complaint at the end of plaintiff's case as follows:

"Mr. LANDIS. If your honor please, I move to dismiss the complaint in both causes of action as against both defendants * * *.

346 With regard to the second cause of action that on the plaintiff's own admission he was not made to work after the captain realized how ill he was. That he was given the best medical attention according to his own statement and was paid off the ship at Ponta del Garda to enter the hospital.

* * * * * * *

"Mr. LANDIS. If your honor pleases, may I renew my motion on the second cause of action, on the ground that there is no proof in this case that the captain had any reason to believe that man was in a serious condition when he suggested that he go to work; and the captain only when he had reason or sufficient reason to know the man was actually ill and suffering excused him. As soon as the captain had an opportunity to find out from the man in charge of that duty aboard that vessel how this man was, he relieved him from duty. He did ask him questions, and Lustgarten's own testimony

and the testimony of this witness who was in the same room was that nothing much was said except, 'I am sick.'

* * * * * * *

"Mr. LANDIS. I renew my motion to dismiss the second cause of action on the ground that this man was given all the medical treatment that was necessary on board that vessel, and was given adequate care and attention.

* * * * * * *

"The COURT. I will deny the motion and allow you an exception."

Second. In denying the defendants' motion to dismiss the second cause of action contained in the complaint made at the close of the entire case as follows:

347 "Mr. LANDIS. If your honor please, I renew my motion to dismiss the second cause of action on the ground that the plaintiff has not succeeded in making out his second cause of action.

"The COURT. I will deny that motion.

"Mr. LANDIS. Exception."

Third. In denying the defendants' motion to dismiss the second cause of action contained in the complaint as against the Consolidated Navigation Company on the grounds that the Consolidated Navigation Company was merely the agent of the owner of the ship at the end of the plaintiff's case as follows:

"Mr. LANDIS. I would like to make a motion that the second cause of action be dismissed as against the second defendant, the Consolidated Navigation Company. Exhibit 4 introduced in this case is the operating agreement which shows upon its face that Consolidated Navigation Company was merely the agent.

* * * * * * *

"The COURT. Motion denied.

"Mr. LANDIS. And I take an exception."

Fourth. In denying the defendants' motion to dismiss the second cause of action contained in the complaint as against the Consolidated Navigation Company at the end of the whole case as follows:

"Mr. LANDIS. If your honor please, I move that the second cause of action be stricken out because it has not been established
348 by the plaintiff that either of the defendants is connected with the steamship on which the plaintiff was employed except as agents.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

Fifth. In denying the defendants' motion to dismiss the complaint as against the United States Shipping Board Emergency Fleet Corporation at the end of the plaintiff's case as follows:

"Mr. LANDIS. I move for a dismissal of the second cause of action on the ground that the United States of America owns this vessel

as shown by this operating agreement and the United States Shipping Board Emergency Fleet Corporation is merely the agent of the United States in the operation of this vessel.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

Sixth. In denying the defendants' motion to dismiss the second cause of action contained in the complaint as against the United States Shipping Board Emergency Fleet Corporation at the end of the whole case as follows:

"Mr. LANDIS. If your honor please, I move that the second cause of action be stricken out because it has not been established by the plaintiff that either of the defendants in this action is connected with the steamship on which this plaintiff was employed, except as agents.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

* * * * * * *

349 Seventh. In denying defendants' motion for a directed verdict as follows:

"Mr. LANDIS. Now, if your honor please, I move that the court direct a verdict for the defendants in this case.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

Eighth. In refusing the defendants' request to charge as follows:

"Mr. LANDIS. If your honor please, may I ask for one instruction? Will your honor charge that if the jury find that the plaintiff has not pulmonary tuberculosis then they must find a verdict for the defendant.

"The COURT. I refuse to so charge. * * *

"Mr. LANDIS. May I except to your honor's refusal to charge?

"The COURT. You may."

Ninth. In charging the jury concerning plaintiff's right to recover damages for injuries received by reason of the fact that he was made to work as follows:

"The COURT. * * * gentlemen, even if you find that he had not pulmonary tuberculosis, the mere suffering of the man during the time that he was at work, if that was caused by a wrongful order and disregard of the duty imposed upon the ship—that in itself might be the basis for an award of damages to compensate him for that suffering, and for any other suffering that you gentlemen upon all the facts and circumstances in this case find he may have
350 had or damage that he may have incurred as the result of the wrongful order, if you find the wrongful order was given.

Mr. LANDIS. And may I except to that part of your charge which states that the jury has a right to return a verdict for any suffering that the plaintiff might have had as the consequence of doing what he did in those two hours."

Tenth. In denying defendants' motion for a new trial as follows:

Mr. LANDIS. If your honor please, I move that the verdict be set aside as contrary to the law and contrary to the evidence and contrary to the weight of the evidence and on all the other grounds set forth in the appropriate section of the civil practice act except on the grounds that the verdict is insufficient; and on the further grounds that the verdict is excessive.

"The COURT. Motion denied.

"Mr. LANDIS. May I have an exception?

"The COURT. Yes."

Wherefore defendants pray that the said judgment of the District Court for the Southern District of New York may be reversed with costs.

Dated, New York, N. Y., October 5th, 1927.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York.
IRVING L. EVANS,
Attorneys for Defendants.

Office & P. O. Address, Room 700—45 Broadway, Borough of Manhattan, city of New York.

352 [Citation in usual form omitted in printing.]

353 In United States District Court

[Title omitted.]

Stipulation on Appeal Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated, New York, N. Y., February 11, 1928.

SILAS B. AXTELL,
Attorney for Benjamin Lustgarten.
CHARLES H. TUTTLE,
Attorney for U. S. S. B. E. F. C.
IRVING L. EVANS,
Attorney for Consolidated Navigation Company.

[Clerk's certificate to foregoing transcript of record omitted in printing.]

355 In United States Circuit Court of Appeals for the Second Circuit

No. 14—October term, 1928

Argued October 11, 1928. Decided October 29, 1928

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN ad litem, John A. Lydecker, defendant in error (plaintiff below)
v.
UNITED STATES SHIPPING BOARD EMERGENCY Fleet Corporation and Consolidated Navigation Company, Inc., plaintiffs in error (defendants below)
} In error to the District Court of the United States for the Southern District of New York

Charles H. Tuttle, U. S. atty., and Edgar G. Wandless, both of New York City (Arthur M. Boal and Frederick R. Conway, both of Washington, D. C., and David B. Landis, of New York City, of counsel), for plaintiffs in error.

Silas B. Axtell, of New York City (Myron Scott, of New York City, of counsel), for defendant in error.

Before MANTON, L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges

Opinion

Per curiam. Judgment affirmed, with costs. See Sloan Shipyards Corp. et al. v. Shipping board Emergency Fleet Corp., 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; U. S. Shipping Bd. Emergency Fleet Corp. v. Greenwald (C. C. A.) 16 F. (2d) 948.

356 In United States Circuit Court of Appeals, Second Circuit

[Title omitted.]

Order for mandate

Filed November 5, 1928

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

M. T. M.
A. N. H.

357 [File indorsement omitted.]

358 [Clerk's certificate to foregoing transcript of record omitted in printing.]

359 In Supreme Court of the United States

Order allowing certiorari

Filed March 5, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsed:] File No. 33,985. U. S. Circuit Court of Appeals, Second Circuit. Term No. 676. United States Shipping Board Merchant Fleet Corporation, sued in the name of the United States Shipping Board Emergency Fleet Corporation and Consolidated Navigation Company, Inc., petitioners, vs. Benjamin Lustgarten, an infant, by his guardian ad litem, John A. Lydecker. Petition for writ of certiorari and exhibits thereto. Filed February 4th, 1929. File No. 33,985.

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No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1928

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

v.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

U.S. GOVERNMENT PRINTING OFFICE: 1929

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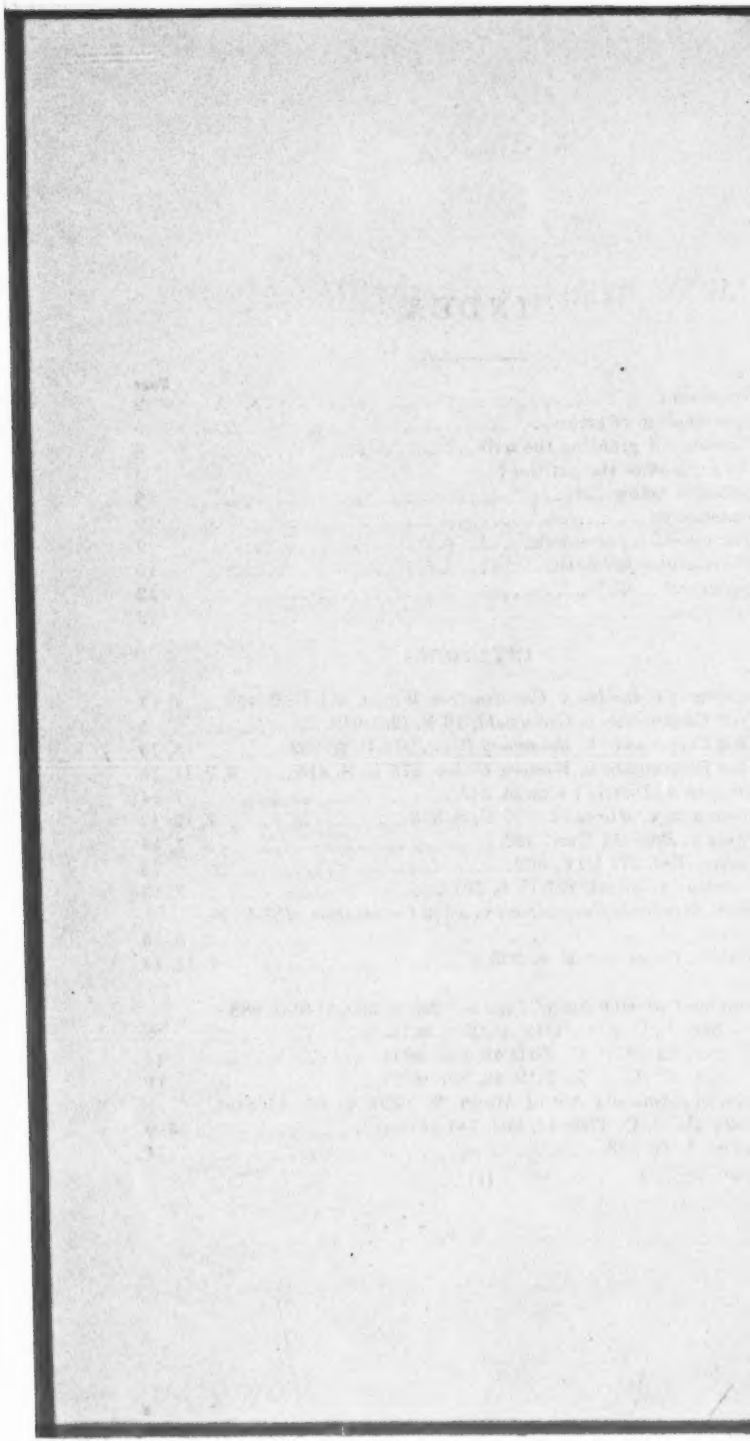

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. —

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

v.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States Shipping Board Merchant Fleet Corporation, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and on behalf of the Consolidated Navigation Company, Inc., prays that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit (R.

356), entered in the above case on November 5, 1928, affirming the judgment of the District Court of the United States for the Southern District of New York. (R. 33.)

STATEMENT

This case involves the question whether the Fleet Corporation and/or the operating agent of a vessel owned by the United States can be held responsible in actions at law for personal injuries sustained by a seaman, because of wrongful acts done at sea by the Master of the vessel and not resulting through personal negligence on the part of the Fleet Corporation and/or the operating agent, such action being in substance against the United States, the Fleet Corporation having no corporate interest in the vessels or their operation.

The *Coelleda*, upon which Lustgarten had shipped as a seaman, was owned by the United States and operated for it by the Consolidated Navigation Company, Inc., under a contract between the United States and that Company (R. 56, 329), by the terms whereof the Company was employed "as its agent to manage, operate, and conduct the business of" the vessel, "in accordance with the directions, orders, and regulations" of the owner; and "subject to such restrictions and in such manner as the owner may prescribe," "to man, equip victual, and supply" the vessel and pay "for account of the owner" the cost thereof and all other costs of the operation; subject to the requirements and

at the expense of the United States, to use reasonable care for the maintenance of the vessel; to exercise care to protect the United States from loss of any kind; to be "subject to the orders of the owners and its authorized representatives as to voyage, charters, rates of freight, and other charges and as to all other matters connected with the agency"; to issue charters and shipping documents in form approved by the United States; to collect freight and all other moneys accruing to the United States from the operation; to deposit all such collections, separately, in the name of the Fleet Corporation, in a bank approved by the United States, to be drawn upon only as directed by it; to keep and render to the United States accounts as the latter might prescribe; in general average cases, to appoint adjusters approved by the United States; and to operate under a trade name approved by the United States, and not under its own trade name. The agent was prohibited, without the approval of the United States, from contracting, in respect to the operation, with any concern in which the agent should be interested, and from operating any foreign flag vessel in competition with any Shipping Board line. The record shows no further connection of the Fleet Corporation with the ship or her operation than the fact that it executed the agency agreement as agent for the United States which was named as the contracting party. (R. 329.) The services of the Fleet Corporation were

of a public nature on behalf of the United States as in *Fleet Corporation* v. *Western Union Telegraph Company*, 275 U. S. pp. 421, 422.

Lustgarten began an action at law in the District Court of the United States for the Southern District of New York against the Fleet Corporation and the operating agent to recover damages upon two causes of action stated: the first, for injuries at sea resulting from the lurching of the vessel, and the second, because afterwards the Master required him, while ill, to work several hours in the galley and denied him necessary treatment and attention, causing hemorrhages resulting in tuberculosis. The evidence tended to show his chest and lungs had been injured by his being thrown against the rail by a sea which boarded the vessel. His contention was that tuberculosis which afterwards developed would not have resulted but for the fact that after his injury he was required to work for a few hours in the galley. The court dismissed the first cause of action, but against objection submitted the second cause of action to the jury for determination, although the testimony that the tuberculosis resulted from the improper acts of the Master was at most highly speculative in character and rested upon the opinion of a single doctor which was contradicted. (R. 4–7, 63, 227–229, 264.)

Answers were filed by the Fleet Corporation and the operating agent denying liability and asking dismissal upon the ground that, as the only relations which the Fleet Corporation and the operat-

ing agent had with the vessel (the negligence complained of being the negligence of the Master) were those as agent for the United States, the action could not be maintained against them, and, in fact, was against the United States and the relief asked differed from that provided by the Suits in Admiralty Act of March 9, 1920. (R. 9–18.) The jury found a verdict for $10,000. Motion to set aside the verdict was overruled and judgment entered thereon. (R. 33, 322, 323.) Writs of error were sued out to the Circuit Court of Appeals, the substantial errors assigned (R. 345–350) being that the highly speculative nature of the testimony that tuberculosis resulted from the Master's negligence did not justify the verdict, and upon the ground that neither the Fleet Corporation nor the operating agent could be sued, as they were agents of the United States and the suit, therefore, in substance one against the United States. The appellate court affirmed on the supposed authority of *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549, and *Fleet Corporation* v. *Greenwald,* 16 F. (2d) 948. (R. 355.)

SPECIFICATION OF ERRORS

Both courts below erred:

1. In failing to dismiss the second cause of action as contrary to law and contrary to the weight of the evidence, as the proofs tending to establish the tubercular condition were uncertain and speculative and not sufficient to support a verdict.

2. In failing to dismiss the second cause of action against the Consolidated Navigation Company, Inc., as that Company was merely the operator of the vessel as the agent of the United States, and the injury complained of was rested upon the negligence of the Master and not the personal negligence of such agent.

3. In failing to dismiss the second cause of action against the United States Shipping Board Merchant Fleet Corporation, sued as the United States Shipping Board Emergency Fleet Corporation, as the Fleet Corporation was the public agent of the United States and the negligence complained of was the personal negligence of the Master of the vessel and not the personal negligence of the Fleet Corporation.

4. In failing to hold that the request for binding instructions directing the jury to find for the defendants should have been granted.

REASONS FOR GRANTING THE WRIT

Numerous actions on the law side by seamen and others are brought against the Fleet Corporation and/or the Fleet Corporation and agents operating Government vessels under agreements identical in form with the one here involved, for recovery of damages caused by negligence of the officers or members of the crew of such vessels, without personal neglect of the Corporation or such agents. Judgments are entered in these cases against the Fleet Corporation in its supposed capacity as a private corporation or the operating agent, or both,

as in this case. They have to be satisfied out of funds of the United States. It has been definitely determined that in the operation of these vessels the Fleet Corporation is a public agent "performing a function of the Government" (*Fleet Corporation* v. *Western Union Telegraph Company,* 275 U. S. 415, 424). The operating agent likewise is to be held a public agent without responsibility unless for personal negligence. To hold that such actions may be maintained against the Fleet Corporation or the operating agent conflicts with the decision of this Court in *Robertson* v. *Sichel,* 127 U. S. 507, 515, where the definite ruling is:

> A public * * * agent is not responsible for the misfeasances or postive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties—

and is in apparent conflict with the decisions in *Hodgson* v. *Dexter,* 1 Cranch, 345; *Parks* v. *Ross,* 11 How. 362; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453.

The effect of these judgments against the Fleet Corporation and the operating agent makes them in fact actions against the Government, as the responsibility for the payment of judgments entered is that of the United States, although in form against the agents. (*Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *Wells* v. *Roper,* 246 U. S. 335.) Upon these causes of action the United States has

consented to be sued as provided by the Suits in Admiralty Act of March 9, 1920, *supra*, which provides the exclusive remedy; otherwise there is entire lack of uniformity as to venue, service of process, rules of decision and procedure, rates of interest, and periods of limitation, which is necessary. This Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, while holding that that Act furnished an exclusive remedy in libel proceedings against the Fleet Corporation, declined to pass upon the question now presented whether the Act was exclusive so as to prevent resort to concurrent remedies against the Corporation on like causes of action in the Court of Claims or in courts of law against the Fleet Corporation.

The case of the *Sloan Shipyards Corporation* v. *Fleet Corporation* dealt with a case where it appeared that the Fleet Corporation had made a contract in its own name and apparently in its own behalf.

As these problems are present in every one of this considerable class of litigation, it is desirable and necessary for the ruling of this Court to be secured.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

No written opinion was filed in the District Court, but the charge to the jury, requests for instructions and rulings thereon appear at pages 314–322 of the Record. The opinion of the Circuit Court of Appeals has not been reported but will be found at page 355 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered November 5, 1928. (R. 356.) The jurisdiction of this Court to issue the writ is found in the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether, for losses at sea sustained through the negligent acts of the Masters or members of the crews of Government owned and operated merchant vessels, actions at law may be prosecuted against the Fleet Corporation and/or the ships' operating agents appointed by the Government, or whether such actions must be prosecuted in the manner in which it has consented to be sued, under the terms of the Suits in Admiralty Act (c. 95, 41 Stat. 525; U. S. C. Title 46, Sec. 741 et seq.). There is involved no question of personal negligence on the part of the operating agent. Any activity of the Fleet Corporation is incident to the performance of its duties as a governmental agency so declared by specific legislation.

This question was specifically reserved for later consideration by this Court in *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202.

THE STATUTES INVOLVED

Merchant Marine Act of June 5, 1920, c. 250, Sec. 1, 41 Stat. 993 (U. S. C., Title 46, Sec. 861):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

and by authority of Sections 12 and 35 of the same Act (U. S. C. Title 46, Secs. 871, 886):

> SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.
>
> SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.

These sections declare the operation of Shipping Board vessels to be a function of the Government and the Fleet Corporation a governmental agency for that purpose. (*Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 421, 422.)

The related sections of the Suits in Admiralty Act are not here set out, as this Act has recently had careful review by this Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition.

ARGUMENT

Numerous actions at law by seamen and others against the Fleet Corporation and agents for the operation of Government owned and operated ships, under contracts identical in form with that here involved, for the recovery of damages caused by negligence of officers or members of the crew of such vessels, are pending in State and Federal courts. The majority of such actions is commenced after the remedy against the Government provided by the Suits in Admiralty Act has become barred. Recovery is sought upon the doctrine of *respondeat superior*. The effect of such judgments is to hold the Fleet Corporation, in its supposed private capacity, or the operating agent, or both, as in this case, liable for obligations of the Government. Such actions, as the Government is responsible for the payment of any judgments entered, in fact, are against the Government, although in form against the agent.

Minnesota v. *Hitchcock*, 185 U. S. 373, 387.
Wells v. *Roper*, 246 U. S. 335.

The vessels involved are owned and operated by the United States in execution of the purpose specified in Sections 1 and 12 of the Merchant Marine Act of 1920 (*supra*). The operation of the ship must be declared in performance of a function of

Government. (*The Pesaro,* 271 U. S. 562, 574.) The sections of the Merchant Marine Act are to be so read and applied. This Court in *Emergency Fleet Corp.* v. *Western Union,* 275 U. S. at page 422, specifically ruled that the services of the Corporation in the operation or its interest in the operation of these vessels are of a public nature. We quote from the opinion:

> But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

The activities of the operating agents are to be likewise so characterized. This Court has laid down the rule in *Robertson* v. *Sichel,* 127 U. S. 507, 515:

> A public * * * agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, 319.

This rule is the basis of similar decisions in *Hodgson* v. *Dexter,* 1 Cranch, 345; *Parks* v. *Ross,* 11 How. 362; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453, as applied to contractual obligations. The Masters and seamen employed upon Government vessels are employees of the Government (34 Op. A. G. 363). As the losses in these proceedings are without personal negligence on the part of the Fleet Corporation and/or operating agents, it would follow that, as they are Government agents, they are not personally responsible and the actions should not successfully be prosecuted against them as they are. If an actionable wrong was committed, liability rests with the Government. The Government is responsible to pay judgments entered against operating agents or reimburse the agents for any payment made. Proceedings against the agent are in substance and effect actions against the Government under the doctrine of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and *Wells* v. *Roper,* 246 U. S. 335. For these losses the Government has consented to be sued by the Suits in Admiralty Act of March 9, 1920. Relief by that Act was held exclusive with respect to admiralty proceedings against the Fleet Corporation. (*Fleet Corp.* v. *Rosenberg Bros.,* 276 U. S. 202.) This Court specifically reserved for future consideration the question—

> Whether in addition to furnishing an exclusive remedy in admiralty, the Act also

> prevents a resort to any concurrent remedies against the United States or the corporations on like causes of action in the Court of Claims or in courts of law. (P. 214.)

The case of *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549, relied on by the court below, arose on the pleadings, from which it was made to appear that the Fleet Corporation, acting in its own corporate interest, had made a contract in its own name and in its own behalf.

Unless the remedy provided in the Suits in Admiralty Act is exclusive, the application of uniform rules of practice, decisions, and procedure can not be secured. Varying rates of interest, periods of limitation, the venue for bringing the action, and methods of service of process must vary, depending upon the court (State or Federal) in which the action may be instituted. The questions thus suggested are important ones and should be definitely settled by the ruling of this Court.

It is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
J. FRANK STALEY,
CHAUNCEY G. PARKER,
F. R. CONWAY,
Attorneys for the United States.

FEBRUARY, 1929.

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No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

v.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 32

UNITED STATES SHIPPING BOARD MERCHANT FLEET Corporation, Sued in the Name of the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, Inc., Petitioners

v.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN Ad Litem, John A. Lydecker

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

No written opinion was filed in the District Court. The colloquy on motions to dismiss, the charge to the jury, requests for instructions and rulings appear at pages 124–125, 142–143, and 170–174 of the Record. The Circuit Court of Appeals affirmed the judgment of the District Court in a brief unreported *per curiam* opinion. (R. 188.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 5, 1928. (R. 188.) Petition for certiorari was filed February 4, 1929, and granted March 5, 1929. (R. 189.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the Fleet Corporation or an operating agent of a merchant vessel owned by the United States, after the passage of the Merchant Marine Act of 1920, liable to a seaman on the vessel for injuries to his health caused by the fault of the officers of the vessel, in the absence of any contention that either defendant had participated in such fault or failed to use due care in selecting the officers?

2. After the passage of the Suits in Admiralty Act, had the seaman a remedy in an action at law against the Fleet Corporation for the neglect mentioned above?

The questions presented are similar to those presented in *Johnson* v. *Fleet Corporation,* No. 5, October Term, 1929, which after a hearing was restored to the docket for reargument and is set down for hearing with the instant case, the two cases to be argued as one. The Court has especially invited argument on the following questions:

1. Is the United States Shipping Board Merchant Fleet Corporation, as an agency of the United States, immune from suit for the tortious acts of persons whom it has employed to carry on the operation of merchant vessels of the United States, and who have been selected by it with due care?

2. Are the remedies given against the United States Shipping Board Emergency Fleet Corporation by the Suits in Admiralty Act of March 9, 1920, exclusive of all other remedies, whether at law or in admiralty, for liabilities of the Fleet Corporation growing out of the operation of merchant vessels of the United States?

3. Is the two-year period of limitation prescribed in the Suits in Admiralty Act applicable to the present suit?

The last question is not involved in the instant case. A separate brief will be filed in behalf of the Fleet Corporation in the *Johnson case,* which will, however, incorporate by reference a large part of this brief.

THE STATUTES INVOLVED

Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 993, 1007 (U. S. C., Title 46, Secs. 861, 871, 886):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is necessary for the national defense and for the proper growth of its foreign and domes-

tic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

* * * * *

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in

accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.

* * * * *

SEC. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

* * * * *

SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.

The pertinent sections of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525–528 (U. S. C., Title 46, Secs. 741, et seq.), are:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or

have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at a higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of ad-

miralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. * * *

* * * * *

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

* * * * *

SEC. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act, shall,

upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

* * * * *

SEC. 11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

SEC. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation, and the Secretary of any

department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

SEC. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.

STATEMENT

Lustgarten brought an action at law on December 3, 1926, in the United States District Court for the Southern District of New York against the Fleet Corporation and the Consolidated Navigation Co., Inc. The United States was not a party. His complaint set forth two causes of action, first, that on March 6, 1926, while he was a seaman on the *Coelleda* he was injured by the lurching of the ship and that his injuries were due to the negligence of the defendant (*sic*) in failing to provide him with a safe and proper place in which to work and in compelling him to perform unnecessary work in a dangerous and unsafe position; and second, that while the officers and master of the vessel knew him to be in need of medical treatment and rest, the same were refused him and he was compelled to work, as a result of which his injuries were aggravated. The complaint averred that the Fleet Corporation

"owned, managed and controlled" the *Coelleda,* and that the Consolidated Navigation Co., Inc., "operated, managed, and controlled" this vessel. (R. 2–3.) The *ad damnum,* originally $30,000, was increased to $50,000. (R. 17.)

The defendants below filed separate answers, denying liability and seeking dismissal. (R. 3–7.) Both answers alleged that the *Coelleda* was and is a merchant vessel "belonging to the United States of America and duly documented and registered in the name of the United States of America;" and as a complete defense to both causes of action they pleaded in bar that whatever rights the plaintiff might have were founded exclusively upon the Suits in Admiralty Act. (R. 4–6.)

The case was tried before a jury. At the conclusion of the testimony introduced by the plaintiff, the defendants moved to dismiss the complaint as to both causes of action on various grounds. (R. 124–125, 142–143.) The court dismissed the first cause of action because no negligence was established, but denied the motion to dismiss the second. (R. 125.) At the conclusion of all of the testimony, defendants renewed their motions to dismiss the second cause of action, and also moved that the court direct the jury to return a verdict for the defendants, but both motions were denied and exceptions were taken. (R. 170.)

Lustgarten introduced evidence tending to show that while dumping ashes overboard on the high

seas he sustained injuries to his head and lungs from being thrown against the rail of the vessel by heavy seas. (R. 28, 29.) He testified that after the injury, the master, knowing his condition, required him to work for two hours in the galley, and that later proper medical attention was not given him. (R. 31–33, 53.) One physician, a witness called by the plaintiff, testified that he was of the opinion that the act of the master in requiring him to work in the condition in which he was following the accident was a competent producing cause of the tuberculosis from which he testified Lustgarten suffered at the time of the trial. (R. 122–123.) The defendants introduced testimony of two other physicians contradicting this testimony. (R. 157–158, 163–166.)

Lustgarten had been shipped by the master in the usual way. (R. 18, 143.) Except for the operating agreement, there was no evidence of any relation of the Fleet Corporation or the Navigation Company to the vessel or to Lustgarten, and there was no evidence of negligence on the part of either corporation in the selection of the master or any other matter. (See R. 143.)

The operating agreement was introduced in evidence as Plaintiff's Exhibit 4 and is set out in full on pages 177 to 181 of the record. It is designated as an "agency agreement for managing and operating vessels" and is in the form now commonly used by the Shipping Board. The parties to the agreement are the United States of America and

the Navigation Company, the recital and the signature showing that the United States acted through the Shipping Board represented by the Fleet Corporation. By it the United States, which is designated as "the owner," employed the Navigation Company "as its agent to manage, operate, and conduct the business of [the] vessel" for its account, and agreed to pay the agent as compensation certain specified commissions and fees, and reserved the right to terminate the agreement and assume control of the vessel at any time. The agent agreed to collect "all freight and other moneys accruing to the owner arising out of the management, operation, and business" of the vessel and to deposit them in a fund which should be the property of "the owner." (Further discussion of the terms and effect of the operating agreement will be found on pages 18–26, *infra.*)

The jury returned a verdict for the plaintiff in the sum of $10,000. (R. 175.) The defendants moved to set aside the verdict on various grounds, but the motion was denied. (R. 175.) Judgment was entered against both defendants for $10,000. (R. 13.)

The Circuit Court of Appeals for the Second Circuit on writ of error affirmed the judgment in a four line *per curiam* opinion, citing as authority *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549, and *Fleet Corporation* v. *Greenwald,* 16 F. (2d) 948.

SPECIFICATION OF ERRORS TO BE URGED

Of the specifications of errors set forth in the petition for the writ of certiorari, the following are now relied upon:

Both courts below erred:

* * * * *

2. In failing to dismiss the second cause of action against the Consolidated Navigation Company, Inc., as that Company was merely the operator of the vessel as the agent of the United States, and the injury complained of was rested upon the negligence of the Master and not the personal negligence of such agent.

3. In failing to dismiss the second cause of action against the United States Shipping Board Merchant Fleet Corporation, sued as the United States Shipping Board Emergency Fleet Corporation, as the Fleet Corporation was the public agent of the United States and the negligence complained of was the personal negligence of the Master of the vessel and not the personal negligence of the Fleet Corporation.

4. In failing to hold that the request for binding instructions directing the jury to find for the defendants should have been granted.

SUMMARY OF THE ARGUMENT

1. The only basis for Lustgarten's recovery was the failure of officers of the vessel to take proper care of him, a seaman, after he had been injured. There was no contention that the officers had not been selected with due care. No person is liable

for the failure to perform the duty except the person whose servants the officers and Lustgarten were. They were servants only of the United States, which owned the vessel and was financially interested in its operation. The Fleet Corporation had no connection with the vessel except to make, as a representative of the United States, an agreement for its operation. By this agreement the Navigation Company undertook to operate the vessel, but only as an agent for the Government. This agreement did not constitute either of the corporations owner of the vessel *pro hac vice.*

2. Even if the above contentions are overruled, the petitioners have a complete defense in that they were agents of the United States performing a public function. The Merchant Marine Act of 1920 in substance declares the operation of merchant vessels of the Shipping Board to be a function of Government. Since the passage of this Act the Fleet Corporation has been the agency through which the Shipping Board has performed its principal functions, and Congress has made annual appropriations for the maintenance and operation of Shipping Board vessels and for the expenses of the Fleet Corporation. The Suits in Admiralty Act provides that any final judgment rendered in any suit authorized by that Act, even though brought against the Fleet Corporation, shall be paid out of the Treasury of the United States. The Navigation Company was similarly a public agent operat-

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ing the vessel for the Government. A public agent is not responsible for omissions of duty of servants properly employed by him or it in the discharge of his or its official duties.

3. No action at law lies against the Fleet Corporation for the tort complained of in the instant case, as the remedy given by the Suits in Admiralty Act is exclusive of all other remedies against the Fleet Corporation on all causes of action arising out of the operation of merchant vessels owned by the United States for which a proceeding in admiralty could be maintained if the vessel were privately owned. Lustgarten had a remedy in admiralty for the tort complained of (if he had any right of action against the Fleet Corporation), but he brought an action at law. This Court has held in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, that the Suits in Admiralty Act furnishes the exclusive remedy in admiralty against the United States and the Fleet Corporation on all maritime causes of action arising out of the possession or operation of merchant vessels owned by the Government. Although it has refrained from expressing an opinion on the precise question raised here, the considerations which led to the decision in the *Rosenberg case* would seem to apply equally to actions at law for maritime torts. If the Act is to provide a uniform system for administration of actions arising out of the operation of Government merchant vessels, the same procedure and the same period of limitation must apply to all proceedings.

Where Congress has undertaken to regulate a whole subject, its legislation necessarily is exclusive and the statutory remedy bars an action at common law which might have been brought but for such legislation. The Jones Act does not furnish a remedy against the United States and the Fleet Corporation separate and apart from the Suits in Admiralty Act, but operates merely to create rights which may be enforced against the United States or the Fleet Corporation under the Suits in Admiralty Act.

ARGUMENT

I

NEITHER OF THE PETITIONERS IS LIABLE TO LUSTGARTEN, BECAUSE THE UNITED STATES ALONE OWED LUSTGARTEN THE DUTY FOR NEGLECT OF WHICH HE RECOVERED

The trial judge submitted the case to the jury solely upon the question of the failure of duty to the plaintiff after the accident occurred. There was evidence tending to show that the captain not only failed to provide Lustgarten with proper care, but also that he required Lustgarten to work when he was unfit to work. (R. 171.)

There is no allegation or testimony that the captain or other officers were not selected with due care. Obviously the person liable for the failure of the captain to perform the duty was the person whose servants the captain and Lustgarten were. An intermediate agent who is guilty of no fault is not

liable for the tort of the servant of his principal. 1 Mechem on Agency (2d ed.), Sec. 1463 and footnote.

(A) THE CAPTAIN OF THE VESSEL AND LUSTGARTEN WERE SERVANTS OF THE UNITED STATES

The vessel was owned by the United States and was being operated under an agreement for the benefit and account of the United States, all moneys collected being deposited to an account of which it was the owner and which could be drawn upon only as directed by the owner.

The precise question discussed under this subheading was considered in an opinion rendered under date of January 17, 1925, by the Attorney General to the President on the question of the right of seamen employed on Shipping Board vessels to the benefit of the Federal Employees' Compensation Act. 34 Op. A. G. 363. In this opinion the Attorney General quotes at length from a statement of facts relating to the management and operation of Shipping Board vessels under the Merchant Marine Act of 1920 prepared by the General Counsel for the Shipping Board (pp. 365–366). He then outlines the identical provisions of the form of agreement involved in the instant case. (R. 177–181.)

The following are extracts from this opinion (p. 366):

> The MO 4 agreement referred to in paragraph 7, *supra,* is, in important particulars,

unlike the contract formerly in use, and considered in 34 Op. 123.

The present form of agreement is "between the United States of America, hereinafter designated as the owner, acting through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation." The word "owner" is substituted for the word "corporation" throughout the new agreement.

The relation of the United States to the management and operation of the ships is now emphasized in numerous provisions of the agreement, including the following: The operation, conduct and business of the vessel is to be "under the supervision of the *owner* at all times." (Par. 1.) The agent agrees to operate and conduct the business of the vessels in accordance with the directions, orders, and regulations which the *owner* may from time to time prescribe. (Par. 2.) The agent agrees to man, equip, victual and supply all vessels "subject to such restrictions and in such manner as the *owner* may prescribe," and to pay "for account of the *owner*" the cost thereof and all other costs and expenses incident to the management, operation and conduct of the vessel as the agent may from time to time be directed by the owner." (Par. 3.) No extraordinary repairs or expenses of any kind shall be made or incurred, and no alteration in the hull, machinery, or equipment shall be made by the agent, except in case of emergency, without first securing in writing the authoriza-

tion of the *owner*, and all such expenses properly incurred shall be for the account of the *owner*. (Par. 4.) The agent is required to exercise reasonable care to protect and safeguard the interests of the *owner* in all respects, and to avoid loss and damage of every nature to the *owner*. (Par. 5.) The agent agrees to deposit all moneys collected on behalf of the *owner* in a national bank or a bank which is a member of the Federal Reserve Association, or some other bank that may be approved by the *owner*, as a separate fund. The money shall be the property of the *owner* and drawn upon only as directed by the *owner*, and all disbursements shall be made in such manner or form as may be prescribed or approved by the *owner*; and the agent must account for all moneys received or disbursed at such times and in such form as directed by the *owner*, and only items supported by proper vouchers or accountings will be allowed in settlement. (Par. 9.)

Paragraph 11 defines the compensation payable to the agent by the United States and the items of cost which the agent agrees to assume and pay for his own account. The latter clearly relate to the individual activities of the agent as distinguished from his operations as set out in the clauses of the agreement hereinbefore referred to.

Under paragraph 16 the owner has the right at any time to terminate the agreement and to assume control forthwith of the vessels and to collect directly all freight moneys

or other debts remaining unpaid; and by paragraph 17:

"The trade name under which a line or route is operated with vessels of the owner shall be subject to the approval of the owner and shall not contain the name of the agent, and such trade name shall remain the property of the owner."

The changes introduced into the new contract were for the purpose of making it clearer that the contract is that of the United States and not that of the Fleet Corporation, and the practical construction by the Shipping Board is thus stated:

"Our view has always been that the masters and crews of Shipping Board vessels are agents and servants of the United States. The vessels are owned by the Government. The Fleet Corporation acting as agent for the United States appoints the managing agents, who in turn select the crew. They do so subject to the rules and regulations issued by the owner. The masters and crews become the agents and servants of the owner, the United States, and not of the intermediary agents, the Fleet Corporation and the managing agents. The latter do only what they are authorized and directed to do in employing the masters and crews." * * *

The present form of contract, as a whole, makes clear the relation of principal and agent between the United States and the agent, with only limited authority in the

agent. It is in no sense a charter or a lease of the vessels. * * *

* * * * *

All the fiscal operations are for the account of the owner—the United States—and are controlled, in detail, by general orders. If the operation of the ships result in a profit, that profit accrues to the United States. If losses result, they are borne by the United States, but the agent nevertheless receives his compensation in either event.

The method by which seamen are hired and paid, as stated by the General Counsel for the Shipping Board, *supra,* show that they are hired by the United States and paid by the United States from its funds.

* * * * *

My conclusion, therefore, as to ships operated under the present MO 4 form of agreement, is that, inasmuch as the ships are owned by the United States, operated for the benefit of the United States with its money and at its expense, and that, as a part of such operation, the men are hired and paid by the United States from money appropriated by the Congress of the United States, these men thus employed, thus hired, and thus paid, are in fact working for the United States. In other words, they are employees of the United States, and as such are entitled to the benefits of the Federal Employees' Compensation Act.

For the reasons set forth in the extracts of this opinion quoted above, we submit that the captain of the *Cocileda* and Lustgarten were servants of the

United States during the voyage in question and not of the Fleet Corporation or of the Navigation Company.

(B) NEITHER OF THE PETITIONERS BECAME THE OWNER OF THE VESSEL "PRO HAC VICE"

It is conceded that the owner of a vessel *pro hac vice* would owe the same duty to the seaman as the general owner of the vessel, but we submit that neither of the petitioners became the owner of the vessel *pro hac vice*.

The Fleet Corporation was never such an owner. Although under the Merchant Marine Act (p. 4, *supra*), the Fleet Corporation is given authority to operate vessels, in the case of the *Coelleda* the only connection of the Fleet Corporation with the vessel was in the making of an agency agreement for managing and operating the vessel which is expressed to be—

> between the United States of America, hereinafter designated as the owner, acting through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, hereinafter called the agent. (R. 177.)

The only other mention of the Fleet Corporation in the agreement is in paragraph 9, in which the agent agrees to deposit moneys collected in behalf of the owner as a separate fund in the name

of the Fleet Corporation; but, although the Treasurer of the Fleet Corporation is allowed to draw checks on this fund, it is provided that the fund shall be the fund of the "owner." (R. 178.)

From the discussion of the scope and effect of the agreement on pp. 18–22, *supra*, it clearly appears that neither the Fleet Corporation nor the Navigation Company became the owner of the vessel *pro hac vice*. As the Attorney General said of this form of agreement in the opinion mentioned above (34 Op. A. G. 363, 368):

> It is in no sense a charter or a lease of the vessels.

See also *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202; *United States* v. *Shea*, 152 U. S. 178, 186–187; *Leary* v. *United States*, 14 Wall. 607; *Baumvoll* v. *Gilchrest & Co.* [1892], 1 Q. B. 253, 258–259.

In his brief in opposition to our petition for certiorari, the respondent argued that clause 7 of the agency agreement (R. 178), which provides that "subagents" selected by the agent shall be held the agents of the agent, is sufficient to stamp the agent as an owner *pro hac vice*. It is clear, however, that the word "subagents" refers to commercial agents in various ports and not to officers and members of the crew. The latter would not be referred to as "subagents" in ordinary or in maritime parlance.

That brief relied on the case of *Fleet Corporation* v. *Greenwald*, 16 F. (2d) 948, which held the

operating agents A. H. Bull & Co. liable, together with the Fleet Corporation, as owners *pro hac vice,* for the death of a seaman. This is also one of the cases cited by the Circuit Court of Appeals in the instant case. The form of agreement which was involved in that case does not appear in the report or in the record in that case, but the opinion stated that the vessel was owned by the Fleet Corporation and that Bull & Co. managed and operated the vessel on a "cost-plus" plan and received a percentage of the profits. Whether the decision of the court in that case was right or wrong, it should not control the instant case. As heretofore shown in this brief, neither the Fleet Corporation nor the operating agent has any interest whatsoever in either the vessel or the proceeds of the operation of the vessel. Both the vessel and the proceeds were the property of the United States and at all time were subject to the control of the United States. It is inconceivable that an agent of the Government could have any interest whatsoever in the property of the Government, and there is nothing in the Merchant Marine Act of 1920 covering the operations of Government-owned vessels by the Shipping Board and its agent, the Fleet Corporation, or in the managing agency agreement above mentioned which would justify the view that either the Fleet Corporation or managing agent would have any interest in either the vessel or the operation of the vessel.

The same brief also cites *Thorp* v. *Hammond,* 12 Wall. [79 U. S.] 408, in support of its contention that the agreement made the petitioners owners *pro hac vice.* This case is, however, entirely distinguishable. There the charterer of the vessel, who was a part owner, hired his own crew, paying and victualing them at his own expense, managed and controlled the ship without the control, restraint, or possession of any other person, and retained half of the net freights. He was held to be owner *pro hac vice.* The situation was entirely different from that in the instant case. Moreover, the question was whether the defendant was a "charterer" within the definition of Section 5 of an Act of Congress of March 3, 1851, which, of course, is not involved here.

II

Neither of the Petitioners is Liable to Lustgarten for the Tortious Acts of Persons Whom They Employed to Carry on the Operation of Merchant Vessels Owned By the United States and Whom They Selected With Due Care, Because the Petitioners Were Performing a Public Function as Agents of the United States

Even if the contention made under our previous heading is overruled, we submit that the petitioners can not be held liable for the tort of the captain of the vessel, because their activities were solely those of public agents. This is the effect of the provision of the Merchant Marine Act of 1920 (pp. 3–4,

supra), which in substance declares the operation of the merchant vessels of the Shipping Board to be a function of Government. See also *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562, 574. Sections 12 and 35 of that Act expressly mention the Fleet Corporation as an agency through which the power and authority vested in the Board by the Act may be exercised. Since the passage of this Act annual appropriations have been made for the expenses of the Fleet Corporation.[1]

This Court in *Emergency Fleet Corporation* v. *Western Union Telegraph Company,* 275 U. S. 415, 421, said:

> Since the passage of the Merchant Marine Act, 1920, the Fleet Corporation has been the agency through which the Shipping Board has performed its principal functions. The activities have consisted largely of maintaining and liquidating property acquired for the United States during the World War, of settling claims arising therefrom, and of operating, or causing to be operated, vessels not disposed of. Besides other activities, the Fleet Corporation has operated directly, and has been interested in the operation of, vessels owned by the United States. Some of

[1] The Appropriation Acts are as follows: Act of March 4, 1921, 41 Stat. p. 1382; Act of June 12, 1922, 42 Stat. p. 647; Act of Feb. 13, 1923, 42 Stat. p. 1241; Act of June 7, 1924, 43 Stat. p. 530; Act of March 3, 1925, 43 Stat. 1209; Act of April 22, 1926, 44 Stat. 318; Act of Feb. 11, 1927, 44 Stat. 1082; Act of May 16, 1928, 45 Stat. 586; Act of Feb. 20, 1929, 45 Stat. 1244.

> these government vessels have been operated in competition with American vessels privately owned. But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

Our contention that the Fleet Corporation is a public agent is also supported by the clause in Section 8 of the Suits in Admiralty Act which provides that any final judgment rendered in any suit authorized by that Act, even though brought against the Fleet Corporation, shall be paid out of the Treasury of the United States (pp. 8–9, *supra*).

We submit that the Navigation Company is similarly a public agent, operating the vessel as the Fleet Corporation might have operated it—for the Government. Under the operating agreement used in the instant case, the agent receives as compensation only certain specified commissions and fees, there is no undertaking on its part to stand any damages, and the Government would have to reimburse the Navigation Company if it should be compelled to pay any damages for personal injuries

incurred in the operation of the vessel, under the circumstances presented by the instant case.

In *Robertson* v. *Sichel,* 127 U. S. 507, 515–516, this Court held:

> A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the sub-agents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, Sec. 319.

See, to the same effect, *Keenan* v. *Southworth,* 110 Mass. 474; *Donovan* v. *McAlpin,* 85 N. Y. 185; 1 Mechem on Agency (2d edition), Sec. 1502.

These proceedings, therefore, while against the agents, are in effect actions against the Government under the doctrine of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and *Wells* v. *Roper,* 246 U. S. 335.

The Circuit Court of Appeals in the instant case and the respondent in this Court in his brief in opposition to our petition for certiorari relied upon *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549. The majority opinion of this Court in that case said that the Fleet Corporation might be sued for a tort, as the fact that a person is a Government agent does not render him immune from liability for his own wrongful acts. We do not understand this case, however, to hold that the Fleet Corporation may be held for the negligence of servants appointed by it. No such question appears to have been presented in that case. Apparently the alleged wrong was a course of

action taken by the Fleet Corporation in pursuance of a definite policy of its officers and directors. As an individual who is a public agent may be liable for his own torts, so a corporation acting as a public agent may be liable for properly authorized corporate action which is tortious. It does not follow that it is liable for the mere negligence of servants appointed by it. Moreover, the status of the Fleet Corporation was somewhat different at the time of the acts complained of in the *Sloan case,* as these acts occurred before the passage of the Merchant Marine Act of 1920.

(This case, of course, has no applicability to our next contention, i. e., that the Suits in Admiralty Act furnishes the exclusive remedy, inasmuch as that case was instituted in the court of first instance before the passage of the Suits in Admiralty Act, and the subject matter thereof was not maritime.)

III

No Action at Law Lies Against the Fleet Corporation for the Tort Complained of in the Instant Case, as the Remedy Given by the Suits in Admiralty Act Is Exclusive of All Other Remedies Against It for all Causes of Action Arising Out of the Operation of Merchant Vessels Owned by the United States for which a Proceeding in Admiralty Could Be Maintained If the Vessel Were Privately Owned

The provisions of this Act which need be considered in the instant case are copied on pp. 6–10, *supra.*

The cause of action upon which judgment below was entered arose in March, 1926. (R. 10.) The action at law was brought within a year. (See R. 9.) No question of the statute of limitations is involved, but we submit that the remedy in admiralty given by the Suits in Admiralty Act was the exclusive remedy which was open to Lustgarten. He might have pursued that remedy but he did not. The record does not show that any attempt was made to follow the procedure required by this Act. The action which he brought was at law, and the trial was before a jury.

This Court has refrained from expressing an opinion on the precise question raised here, i. e., whether the Act prevents a resort to any remedy outside of those in admiralty. We submit, however, that the considerations which led to the decisions hereinafter cited must lead to the conclusion that the Act does prevent resort to an action at law.

In *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, this Court held that the Act not only substituted for a suit *in rem* one *in personam,* but also had a wider effect and created a broader personal obligation of the United States, as the owner of an offending vessel, like that of a private owner, which might be enforced in admiralty by a libel *in personam* in cases where there was no basis for an action *in rem.*

In *Fleet Corporation* v. *Rosenberg Bros.,* 276 U. S. 202, 213–214, this Court said:

> The Act * * * provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the judgments against the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other Acts.
>
> In view of these provisions of the Act we can not doubt that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels. And nothing in its legislative history indicates a different purpose.

This Act has provided a remedy for the satisfaction from Government money of all claims of a maritime nature arising out of the operation by the Fleet Corporation, or by or for the Government, of merchant ships. It treats the United States and the Fleet Corporation exactly alike in almost every respect—as to the remedy, the time to sue, the method of procedure, the measure of recovery, and

the source of satisfaction, which is the public treasury. The provision for payment of decrees against the Corporation with public money stamps as public every activity that may form the basis of any such decree. This Act has provided a system for adjudication and satisfaction of all obligations of the Fleet Corporation arising out of the possession, ownership, or operation of ships. No other system is provided.

It has been recognized by this Court that where Congress has undertaken to regulate a whole subject, "its legislation is necessarily exclusive" and that a statutory remedy bars an action at common law which might have been brought, but for such legislation. *Arnson* v. *Murphy,* 109 U. S. 238, 243. See also *United States* v. *Pfitsch,* 256 U. S. 547; *Nassau Smelting Works* v. *United States,* 266 U. S. 101.

It is inconceivable that Congress in providing for payment of a final judgment from the public treasury if a suit were brought against the Fleet Corporation in admiralty intended that in an action at law for the same tort a judgment might be obtained which would not be paid from the public treasury. It would have been well nigh futile to have provided for a system of administration in regard to remedies against the United States and the Fleet Corporation in connection with the operation of merchant vessels, if such system applied only to suits brought in admiralty, and its uni-

formity could be upset and its purposes destroyed by the bringing of actions at law.

In an opinion rendered since the decision of the *Rosenberg (West Aleta) case, Royal Insurance Co., Limited,* v. *Fleet Corporation,* 1929 A. M. C., 393 (certiorari granted, October Term, 1929, No. 123), District Judge Thacher used the following convincing language (p. 394):

> In *Cerosco; Federal Sugar Rfg. Co.* v. *United States,* 1929 A. M. C. 84, the Circuit Court for this Circuit held that the Act was exclusive of all suits against the United States by petition under the Tucker Act for causes of action which might have been brought under the Suits in Admiralty Act. The fact that the petition in that cause might have been treated as a declaration at law was held not to affect the question, and the decision turned upon the conclusion that "every consideration which moved the Supreme Court to declare that the Act superseded the usual libel equally applies to a petition upon the same cause of action under the Tucker Act, however cast." In this connection it was, however, said: "More can be said in favor of retaining actions at law against the Fleet Corporation. These are triable to a jury, and it is possible that Congress intended to leave them with whatever limitations chanced to be applicable." But to so decide would be to defeat the obvious plan and purpose of the statute, which, as declared in the *West Aleta,* was to provide a complete system of administration applying

to the United States and to corporations in which it is the only stockholder, under which uniformity is provided in procedure for the enforcement of remedies, limitation upon the right to sue, recovery of interest, payment of judgments recovered out of moneys in the Treasury, and a report to Congress of all final judgments rendered in suits under the Act. The statute applies this system without discrimination to suits against the Government and suits against corporations in which it is the only stockholder. It has been held exclusive of other remedies because the pursuit of such remedies would nullify its provisions. If concurrent legal remedies are still available, not only Sec. 5, limiting the right to sue, but Sec. 3 in its provision for the recovery of interest at four per cent. unless otherwise stipulated, may be evaded at the choice of any complainant. That the Act was intended to be exclusive is emphasized by the fact that the Attorney General is required to report to Congress all final judgments entered in suits under the Act. Such reports would be of little value if judgments against the Fleet Corporation were recoverable at law in like suits. Nor is it to be assumed that Congress intended to preserve the right to trial by jury in actions brought against a corporation in which the entire capital stock is owned by or held for the United States. Legislative intent is clear to put the Fleet Corporation upon a plane with the Government itself insofar as liabilities arising out of the operation of

> merchant vessels are concerned. If one looks beneath the corporate form to the interests of the Government affected by such suits, there was strong reason for following traditional policy in requiring trial without a jury.
>
> All this being so, every consideration which influenced decision in the *West Aleta, supra,* and in *Cerosco, Supra,* applies to these actions at law against the Fleet Corporation, and leads to the conclusion that such actions, as well as suits in Admiralty and actions against the United States under the Tucker Act, are not maintainable if remedies for the same causes of suit were available under the Suits in Admiralty Act. Actions at law maintainable under statutes enacted subsequent to the enactment of the Suits in Admiralty Act are not here in question, and the right to maintain such actions, notwithstanding the provisions of the earlier statute, is neither considered nor adjudicated.
> * * *

We submit that the considerations mentioned in this opinion are applicable to *all* suits or actions against the Fleet Corporation on causes of action for which there is a remedy in admiralty.

The importance of a uniform system of procedure and limitation is illustrated by what happened as a result of the situation out of which the *Royal Insurance Company case* arose. Cargoes belonging to several different owners aboard the Steamship *Eastern Glade* were damaged in 1922. With-

in the two-year period various underwriters in the name of shippers filed libels against the United States under authority of the Suits in Admiralty Act, and the United States was held liable for these losses. Thereafter, on September 7, 1928, almost six years after the damage occurred, the Royal Insurance Company brought the above case. As Congress provided for a report at each of its sessions of all suits under the Act in which final judgment has been rendered for or against the United States and the Fleet Corporation, in which the time to appeal shall have expired, it is inconceivable that Congress intended to permit the prosecution of exactly the same kind of claims—either in contract or tort—in such a way that no report of them would be made, and that prosecution of such claims could be delayed three times as long as if they were prosecuted under the Act.

A strong reason for the construction of the Act for which we contend is to be found in the limitation provision in Section 5 of the Act. It provides that all suits "hereunder" (with an exception not here material) are to be "brought within two years after the cause of action arises." In many suits which might have been brought for the same causes of action under other Acts, the limitation period is six years. The language of Section 5 does not expressly apply to suits not brought "hereunder." Congress must have had a reason for providing a limitation period much shorter than that in the usual statutes of limitation. It is de-

sirable to have prompt settlements of claims relating to Government owned merchant vessels. Another practical reason may have been that the testimony of seafaring witnesses is unusually difficult to obtain and present to the court, as they become scattered in all parts of the world, and where the prosecution of maritime claims is delayed their successful defense is seriously prejudiced. A number of other Federal statutes have prescribed a two-year limitation for causes under maritime jurisdiction. General Salvage Act, c. 268, 37 Stat. 242, (U. S. C. Title 46, Secs. 727–731); Section 33, Merchant Marine Act, 1920, c. 250, 41 Stat. 988, 1007; Death on the High Seas Act, c. 111, 41 Stat. 537 (U. S. C., Title 46, Secs. 761–768); Public Vessel Act, c. 428, 43 Stat. 1112 (U. S. C., Title 46, Secs. 781–790); Cummins Amendment, c. 91, 41 Stat. 456, 494. Whatever reasons Congress may have had for prescribing the two-year limitation period, it is clear that they would be frustrated if actions either in contract or tort could be brought outside of the Suits in Admiralty Act after two years.

In *Federal Sugar Refining Co.* v. *United States,* 30 F. (2d) 254 (which case is set down for hearing on a writ of certiorari after the hearing in the instant case), question arose as to whether a suit against the United States as owner of a merchant vessel on account of damage to a cargo could be maintained when the petition was filed more than two years after the cause of action arose. The Circuit Court of Appeals for the Sec-

ond Circuit affirmed a decree of the District Court of the United States for the Southern District of New York, dismissing the petition. Judge Learned Hand in the opinion of the court said (pp. 255–256):

> We can therefore see no reason why the Suits in Admiralty Act should not override a suit by petition against the United States, so far as it seeks relief analogous to that granted in the admiralty, just as it overrides libels against the Fleet Corporation.
>
> The petition, viewed as a declaration at law, might theoretically stand upon another footing; but we think it cannot. If it does, the result is not only that the limitations for torts differ from that for contracts, but that by a mere form of words the party aggrieved may avoid the limitation of section 5; he need only call his petition a declaration and he secures the longer period. Indeed, under present-day conditions, when the right to amend is readily granted and forms of the pleading count for little, he may contrive to avoid the act at any stage of the suit. Section 5 becomes brutum fulmen, and the limitation is six years, if the petitioner wishes to have it so. We cannot think that section 13 meant to leave this possibility open.

One other matter remains to be considered. Lustgarten has contended that his action lies under the Jones Act (Sec. 33, which is copied on page 5, *supra*), which was passed a few months after

the Suits in Admiralty Act. This section, however, gives a right of action only against the person whose servant the seaman is. As we have pointed out, Lustgarten stood in the relation of servant only to the United States; the petitioners were only intermediate agents.

If, as we contend, the remedy given by the Suits in Admiralty Act was intended to supersede all other remedies then existing, it can not be supposed that soon after the passage of that Act the same Congress would have made an exception to the procedure provided by that Act. Or, if Congress had so intended, it seems probable that it would have indicated its intention in clear and express language. This it did not do in the Jones Act.

As this Court said in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 384:

> But as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, * * * subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed. * * *

The contention that rights and remedies against the United States and the Fleet Corporation exist under the Jones Act separate and apart from the Suits in Admiralty Act presupposes an inconsistency of purpose and would bring about an absurd

result. On the other hand, our contention gives a full and harmonious effect to both Acts, for the Jones Act, as construed in *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, *supra,* gives a remedy in admiralty against owners of vessels privately owned or operated, which satisfies the conditions of Section 2 of the Suits in Admiralty Act, so that the latter operates to give a remedy against the United States or the Fleet Corporation in cases of vessels owned or operated by the United States or the Fleet Corporation.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the cause remanded with directions to enter judgment for the defendants.

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OCTOBER, 1929.

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CHARLES ELMO

Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 732

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC.,

Petitioners,

v.

BENJAMIN LUSTGARTEN, an infant, by his Guardian ad Litem, JOHN A. LYDECKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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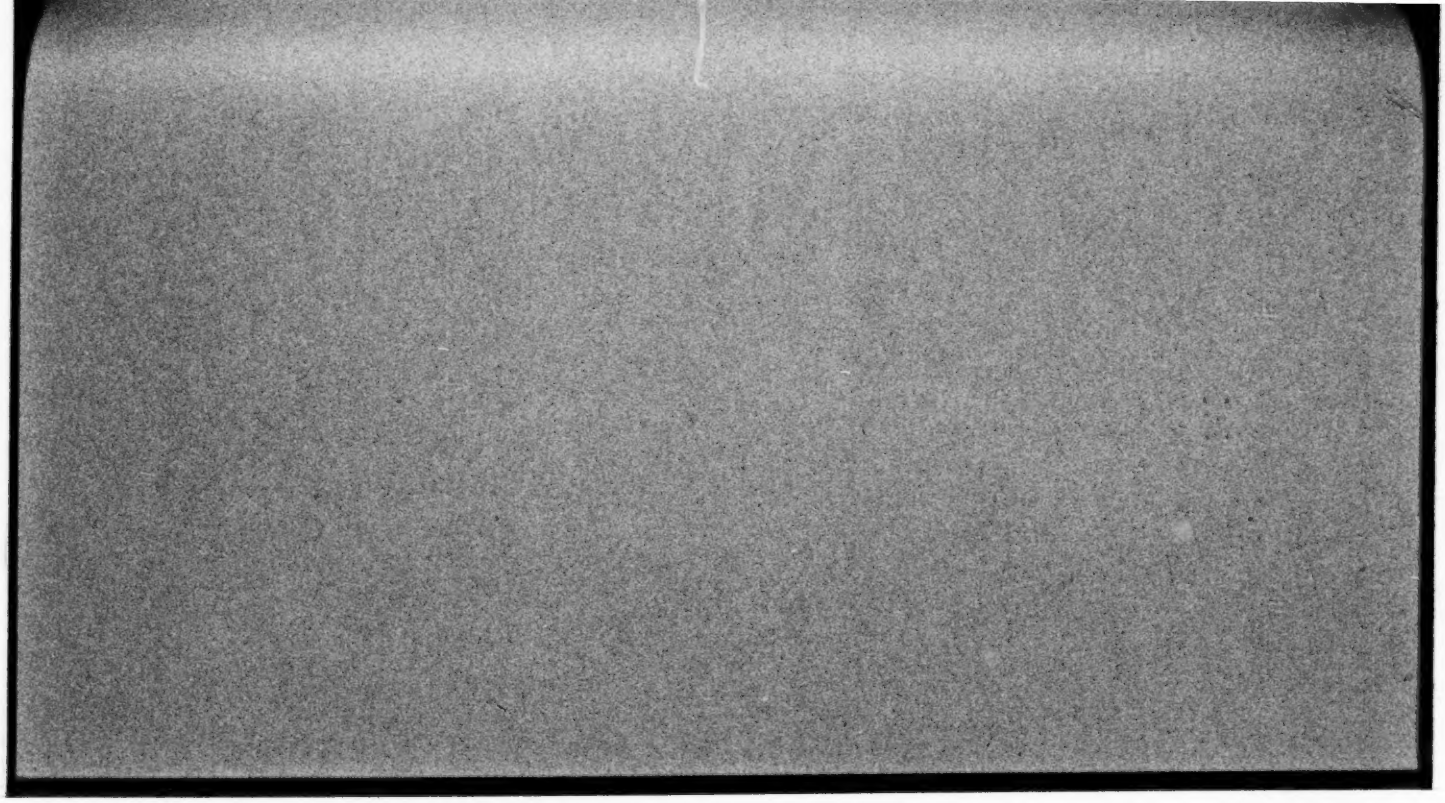

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. .

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC.,

Petitioners,

v.

BENJAMIN LUSTGARTEN, an infant, by his Guardian ad Litem, JOHN A. LYDECKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Respondent, on March 5, 1926, while employed as a seaman on board the S. S. "Coelleda", sustained severe personal injuries. He was slightly over eighteen years of age at the time, and the master of the vessel compelled him to work immediately after sustaining these injuries, and failed to provide him with proper medical attention, all of which aggravated his injuries and resulted in tuberculosis. Thereafter, by his Guardian ad Litem, the infant brought an action for damages at law in the United States District Court for the Southern District

of New York, under the authority of Section 33 of the Jones Act (June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. 688) against two defendants, United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, Inc. The defendant, Consolidated Navigation Company, Inc., a private corporation organized under the laws of the State of Maryland (R. 329), managed and operated the S. S. "Coelleda" under an agency agreement set out in full at pages 329-338 of the Record.

The jury rendered a verdict in favor of the plaintiff for $10,000, upon which judgment was entered against both defendants. The United States Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court on the authority of *Sloan Shipyards Corporation* v. *U. S. Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, and *U. S. Shipping Board Emergency Fleet Corporation* v. *Greenwald* (C. C. A.) 16 F. (2nd) 948 (R. 355).

The case now comes before this Court on a petition for a writ of certiorari, to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit. As the basis for this application, petitioners argue that the defendant, Consolidated Navigation Co., Inc., is not liable to suit because it operated the "Coelleda" merely as the agent of the United States; and that the Fleet Corporation also is not liable for the same reasons which it advanced seven years ago in the case of *Sloan Shipyards Corporation* v. *U. S. Shipping Board Emergency Fleet Corp'n, supra.*

Argument.

POINT I.

It is well settled that the Fleet Corporation may be sued in an action at law; this Court so ruled in *Sloan Shipyards Corporation* v. *Fleet Corporation*, 258 U. S. 549 (1922).

The judgment and decree of the Courts below do not present any question that is novel or unsettled. The old and outworn arguments now advanced by petitioners have been thoroughly considered and passed upon by this Court and by other Courts on numerous occasions.

Sloan Shipyards Corporation v. *U. S. Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 (1922);
United States v. *Strang*, 254 U. S. 491 (1921);
The Lake Monroe, 250 U. S. 246 (1919);
U. S. Shipping Board Emergency Fleet Corp. v. *Greenwald*, 16 F. (2d) 948 (1927);
U. S. Shipping Board Emergency Fleet Corp. v. *O'Shea*, 5 F. (2d) 123 (1925);
Wallace v. *U. S. Shipping Board Emergency Fleet Corp.*, 5 F. (2d) 234 (1925);
Cox v. *Lykes Brothers and U. S. Shipping Board Emergency Fleet Corp.*, 237 N. Y. 376 (1924).

Petitioners lay emphasis on the purpose of the Merchant Marine Act of June 5, 1920 (c. 250, 41 Stat. 988), as set forth in Sections 1, 12 and 35 of that Act (U. S. C. Title 46, Secs. 861, 871, 886). They argue therefrom that

the operation of a ship must be declared to be in performance of a function of government, and accordingly that the Fleet Corporation and Consolidated Navigation Co., Inc., are government agents, not personally responsible, but immune from suit. We respectfully call attention to the fact that this Court considered and discussed the significance of this very same Merchant Marine Act of 1920 in the *Sloan Shipyards* case, decided in 1922. The Court in its opinion (at p. 566) specifically refers to sections of the Act, and after considering their import, concludes that the Fleet Corporation is nevertheless subject to suit. The Fleet Corporation in the *Sloan Shipyards* case argued that it so far embodies the United States that the suit should have been brought in the Court of Claims, as it was in effect a suit against the United States. This Court disposed of the argument as follows:

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name" (pp. 567-568).

The fact that the Fleet Corporation was formed under the General Laws of the District of Columbia is alone persuasive that it is expected to stand suit in its own person, whatever indemnities might be furnished by the United States. *Sloan Shipyards,* 258 U. S. 549, at page 570.

Petitioners' brief quotes from the opinion of this Court in *Fleet Corporation* v. *Western Union,* 275 U. S.

415, at page 422, to the effect that the services of the Fleet Corporation in the operation of its vessels are of a public nature, in view of the language of the Merchant Marine Act of 1920. But this Court carefully weighed the significance of this same Act and accorded it full recognition in the *Sloan Shipyards* case (see *supra*). There is, moreover, nothing inconsistent between the holding of this Court in the *Western Union* case and the liability of the Fleet Corporation in the instant case, as enunciated in the *Sloan Shipyards* case. All that was decided in the *Western Union* case was that the Fleet Corporation is a department of the United States within the meaning of the Post Roads Act (July 24, 1866, c. 230, 14 Stat. 221, 47 U. S. C., Secs. 1-3, 6) so as to entitle it to the government rate on telegraphic messages sent over the lines of the Western Union, "not because it is an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act" (275 U. S. 415, at p. 426). Since the Western Union never questioned the right of the United States Shipping Board to the government rate on official messages, this Court held that it ought to accord equal treatment to the messages of the Fleet Corporation.

Petitioners advance the further argument that an exclusive remedy was afforded the respondent under the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525, U. S. C. Title 46, Secs. 741 *et seq.*) which prevented him from resorting to an action at law, and they lay stress upon a dictum of this Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, at page 214. The only proper inference to be drawn from the passing remark

of Mr. Justice Sanford in the *Rosenberg Bros.* case is that this question was not involved in the matter then before the Court for decision, not that the Court reserved it for future consideration.

It must be borne in mind that the Suits in Admiralty Act of March 9, 1920, had been enacted upwards of two years prior to the decision of this Court in the *Sloan Shipyards* case, and that this Court decided against the contentions of the Fleet Corporation and held it amenable to suit both at law and in equity. If there were any merit to the argument that this Act provides the exclusive remedy of resorting solely to a libel in admiralty, the *Sloan Shipyards* case would have been decided differently, for in that case the plaintiff brought a bill in equity against the Fleet Corporation, and in the companion case, *Astoria Marine Iron Works* v. *Emergency Fleet Corporation,* 258 U. S. 549, 569, the plaintiff brought an action at law, yet this Court held that there was jurisdiction in the State and Federal Courts to entertain both classes of actions against the Fleet Corporation. The Court in the *Sloan* case specifically referred at page 567 of its opinion to the fact that the argument was then being advanced that special remedies were provided by statute that displace those that otherwise would be at the plaintiff's command.

Furthermore, consideration was given in the *Sloan* case to the effect of the argument now being advanced by the Fleet Corporation that the Suits in Admiralty Act affords the exclusive remedy because it provides uniformity. The answer to this argument that lack of uniformity would obtain if the Fleet Corporation were

subject to suit is found at pages 568-569 of the opinion in the *Sloan* case:

> "It is suggested that there will be lack of uniformity if suits can be brought in State Courts. This consideration cannot control our conclusion from the Statutes. But it is not very serious, since such suits against this Corporation can be removed to the Courts of the United States (Pacific R. Removal cases, 115 U. S. 1), and afterwards are subject to review here."

The same contention was raised by the Fleet Corporation in *United States Shipping Board Emergency Fleet Corporation* v. *O'Shea,* 5 F. (2nd) 123 (1925), and in *Wallace* v. *United States Shipping Board Emergency Fleet Corporation,* 5 F. (2nd) 234 (1925), and the Courts disposed of it in like manner relying upon the decision of this Court in the *Sloan* case as determinative. These cases squarely hold that the Suits in Admiralty Act invoked by the defendants has no application in a case of this kind. And they hold further that the oft-repeated argument of the Fleet Corporation that there might be confusion if this Act is not held exclusive, is one which cannot control the determination of the Courts.

POINT II.

Section 33 of the Jones Act expressly authorizes common law actions by seamen for personal injuries sustained in the course of their employment. The courts without exception have held the Fleet Corporation and its operating agents liable in such common law actions.

Section 33 of the Jones Act (June 5, 1920, c. 250, 41 Stat. 1007, U. S. C. Title 46, Sec. 688) provides as follows:

> Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the *right of trial by jury*, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Italics ours.)

It is significant that this Act was passed subsequently to the Suits in Admiralty Act of March 9, 1920, and that it contains no limitation such as the petitioners now

seek to impose upon this respondent on his rights as an injured seaman to bring an action at law against the Fleet Corporation and the managing and operating agent. Nor is there a word in the entire earlier statute, the Suits in Admiralty Act of March 9, 1920, which would deprive the respondent herein of his right to "maintain an action for damages at law, with the right of trial by jury" which is so carefully safeguarded to him by Section 33 of the Jones Act, enacted on June 5, 1920.

The language of Section 33 of the Jones Act is clear, explicit and comprehensive:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *."

This Court in *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375 (1924), thoroughly considered the significance and applicability of Section 33 of the Jones Act, stating that it was enacted as part of an Act the expressed object of which was "to provide for the promotion and maintenance of the American merchant marine" (264 U. S. 375, at p. 389). And that the terms of the statute are not imperative but permissive. "It says 'may maintain' an action at law 'with the right of trial by jury', the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the Court with a trial by jury as an incident" (264 U. S. 375, at pp. 390-391).

The Court in *Panama R. R. Co.* v. *Johnson,* plainly states that the right of an injured seaman to maintain an action for damages at law with the right of trial by

jury is conferred by an Act the avowed purpose of which is "to provide for the promotion and maintenance of the American merchant marine" (264 U. S. 375, at p. 389). And yet this is the very language of the Merchant Marine Act of June 5, 1920, now relied on by petitioners in support of their present argument.

The Courts without exception have held the Fleet Corporation and its managing and operating agents liable in such common law actions; and they have uniformly held that there is no warrant or basis whatsoever in the letter or spirit of the Act for any exception thereto in favor of Fleet Corporation vessels.

Emergency Fleet Corporation v. *O'Shea,* 5 F. (2nd) 123 (1925);
Wallace v. *Emergency Fleet Corporation,* 5 F. (2nd) 234 (1925);
Emergency Fleet Corporation v. *Greenwald,* 16 F. (2nd) 948 (1927);
Howarth v. *Emergency Fleet Corp'n et al.,* 24 F. (2nd) 374 (1928).

See also:

Cox v. *Lykes Brothers and Emergency Fleet Corporation,* 237 N. Y. 376 (1924).

Both the Fleet Corporation and the Consolidated Navigation Co., Inc., are liable for this tort to the plaintiff, as owners *pro hac vice,* and as agents, since they are primarily and secondarily responsible for the management and operation of the S. S. "Coelleda". The Fleet Corporation executed the operating agreement, selected the managing agent, received and collected the revenues of the vessel and the funds were deposited in a bank in its

name. The fact that the Fleet Corporation retained a check on the personnel and allowed the cost of the ship's food and supplies to be charged to its account by the Consolidated Navigation Co., in no way discharges the responsibility of the latter as a joint tort feasor. The defendant Consolidated Navigation Co., Inc., a private commercial corporation, organized for profit and existing under the laws of the State of Maryland, agreed to man, equip, victual and supply the vessel, and to pay the costs and expenses incident to the management, operation and conduct of the business of the vessel; to maintain and repair it; to exercise reasonable care to protect and safeguard the interests of the owner and to avoid loss and damage to the owner; to select agents or sub-agents and be responsible in all respects for their acts, and such sub-agents were in no respect to be the agents of the owner but solely the agents of the Consolidated Navigation Co., Inc.; to pay the costs and expenses of furnishing and preparing all cargo and shipping documents, all administrative and general expenses and the fees and expenses of its sub-agents. It further agreed that whenever the owner required, it would furnish a bond for the faithful performance of its duties and obligations under the agreement (R. fol. 1006). It received as compensation a percentage of the gross freight and passenger revenue (R. fols. 997-999).

Similar operating agreements have been before the Courts on numerous occasions, and after thorough consideration the managing and operating agents have been held to be owners *pro hac vice* together with the principal, the Fleet Corporation. In *Fleet Corporation* v. *Greenwald,* 16 F. (2d) 948 (1927), the Court held the operating agents A. H. Bull & Co. liable, together with the

Fleet Corporation, as owners *pro hac vice* for the death of a seaman.

Clause 7 of the Agency Agreement in the instant case provides that the agent shall be responsible for the acts of its sub-agents and that the latter shall not in any respect be the agents of the owner but solely the agents of said agent (R. fol. 992). This provision is alone sufficient to stamp the Consolidated Navigation Co., Inc., as an owner *pro hac vice.*

In *Thorp* v. *Hammond,* 79 U. S. 408 (1870), the person who had made an arrangement to man, equip and supply his ship and retain half the net freight was held personally liable as an owner *pro hac vice* for a collision with another vessel.

Petitioners argue that the Consolidated Navigation Co., Inc., as the operating agent of the S. S. "Coelleda" is a public agent without responsibility unless for its personal negligence, and they cite *Robertson* v. *Sichel,* 127 U. S. 507 (1888), as their apparent authority for this view. That case lends no support whatever to the proposition that the operating corporation in the instant case is immune from suit. All that was decided in *Robertson* v. *Sichel* was that the Collector of Customs for the Port of New York was not personally liable for the negligence of his subordinates in failing to send a passenger's trunk to the public store, where there was no evidence to connect the Collector personally with the wrong or that the subordinates were not competent or not properly selected for their positions. In our case we are dealing with corporations, not individuals, and it is elementary that corporations can act only through their agents and employees and are responsible for their acts. The argument

of petitioners amounts to this—that a corporation is not responsible for the negligent acts of its employees, and that if the latter are negligent, the corporation is not answerable therefor.

To speak of Consolidated Navigation Co., Inc., as a public agent, immune from suit for the torts of the master of the vessel, does violence to language. If the doctrine of immunity did not avail the Fleet Corporation as this Court decided in the *Sloan* case, *a fortiori,* it cannot avail a private corporation organized under the laws of a State and engaged in the business of operating vessels for profit.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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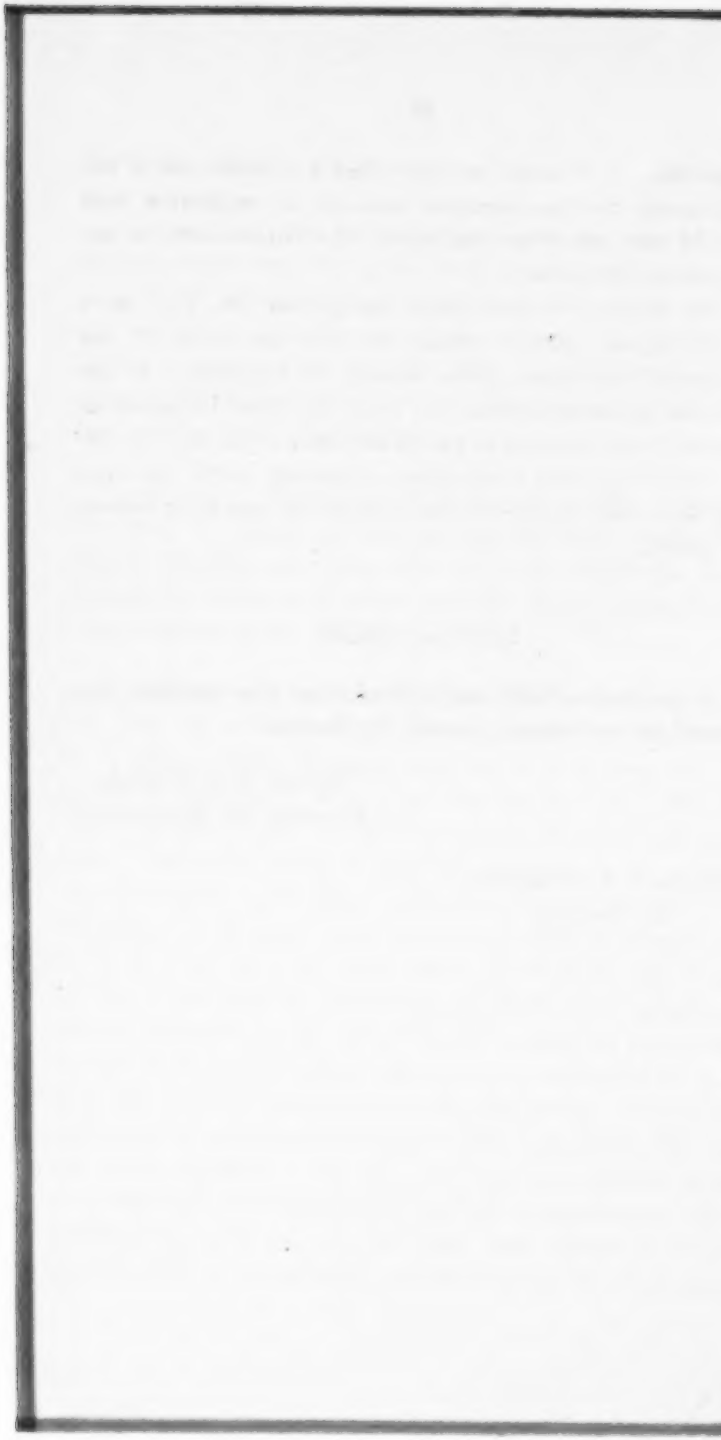

SUPREME COURT OF THE UNITED STATES.

Nos. 5, 32, 56 and 123.—October Term, 1929.

John Johnson, Petitioner,
5 *vs.*
United States Shipping Board Emergency Fleet Corporation.

United States Shipping Board Merchant Fleet Corporation, Sued in the Name of the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, Inc., Petitioners,
32 *vs.*
Benjamin Lustgarten, an infant, by his Guardian, ad Litem, John A. Lydecker.

Federal Sugar Refining Company, Petitioner,
56 *vs.*
The United States of America.

Royal Insurance Company, Ltd., et al., Petitioners,
123 *vs.*
United States Shipping Board Merchant Fleet Corporation.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

No. 5.

August 1, 1920, petitioner was an unemployed seaman. The steamship Jacksonville, then lying in the port of Jacksonville, Florida, was a merchant vessel owned by the United States and operated for it by the Fleet Corporation. On that day, petitioner went aboard to seek employment and, when returning to the shore, fell from the gangplank and suffered serious injuries. This is an

action at law brought by him in April, 1923, against the Fleet Corporation in the Supreme Court of New York to recover damages for such injuries. The complaint alleges that, due to the negligence of the defendant's officers and employees, the gangplank was insecure and that plaintiff's injuries were caused thereby. The defendant removed the case to the United States District Court for the Eastern District of New York. Its answer denies the negligence charged in the complaint and alleges that plaintiff was guilty of contributory negligence; that, whatever his rights, plaintiff's remedy is provided exclusively by the Suits in Admiralty Act, approved March 9, 1920, 41 Stat. 525, 46 U. S. C., § 741 *et seq.*, and that his claim is barred because, as appears by the complaint, the action was not commenced within the two years prescribed by that Act. The District Court submitted the case to a jury and charged that, if guilty of contributory negligence, plaintiff could not recover. There was a verdict for defendant and the judgment thereon was affirmed by the Circuit Court of Appeals. 24 F. (2d) 963.

No. 32.

March 6, 1926, the steamship Coelleda was a merchant vessel owned by the United States and operated for it by the Navigation Company as agent pursuant to an agreement made by the United States acting through the Shipping Board represented by the Fleet Corporation. Merchant Marine Act, 1920, §§ 12, 35, 41 Stat. 993, 1007. 46 U. S. C. §§ 871, 886. Respondent was a seaman employed thereon. This is an action at law brought by him in the United States District Court, Southern District of New York, against the Fleet Corporation and the Navigation Company to recover damages for injuries alleged to have been sustained by him while in that service. The complaint alleges two causes of action: (1) that, due to the negligent failure of defendants to furnish him a safe place in which to work, plaintiff was severely injured; and (2) that, being injured and in need of medical treatment and rest, he was refused such treatment by the master and officers of the ship and was compelled to continue to work. The answer of each defendant denies the negligence and wrongful acts charged in the complaint and alleges that, whatever his rights, plaintiff's remedy is provided exclusively by the Suits in Admir-

alty Act, and that therefore this action cannot be maintained. The trial court dismissed the first cause of action; and, after denying defendants' motion that a verdict in their favor be directed, submitted the second to a jury. There was a verdict for plaintiff, and the judgment entered thereon was affirmed by the Circuit Court of Appeals.

No. 56.

The United States owned and, through the Shipping Board and West India Steamship Company as agent, operated the merchant vessel Cerosco. In February, 1920, at Sagua La Grande, Cuba, sugar was delivered to the vessel for transportation to New York and delivery there in accordance with bills of lading issued by the master. The vessel arrived in New York in the month following but, because some of the sugar was lost and some was damaged on the voyage, she failed to make delivery as agreed. January 5, 1924, this action was brought by petitioner in the District Court for the Southern District of New York against the United States under the Tucker Act, Judicial Code, § 24(20), 28 U. S. C., § 41(20), to recover damages—less than ten thousand dollars—for failure to perform the contracts evidenced by the bills of lading. The trial court gave judgment for the defendant. The Circuit Court of Appeals, being of opinion that the limitations prescribed by the Suits in Admiralty Act governed, held that the action was too late and affirmed the judgment. 30 F. (2d) 254.

No. 123.

The steamship Eastern Glade was a merchant vessel owned by the United States and operated by the Fleet Corporation. Merchandise was delivered to the vessel at New York for transportation to various destinations and delivery upon the orders of the consignees. Two actions, one by underwriters and the other by owners, were brought against the Fleet Corporation in the Supreme Court of New York to recover for loss and damage of cargo alleged to have been caused by the negligence of the defendant. The causes of action accrued in December, 1922. The suits were not commenced until September 7, 1928, long after the expiration of the period of limitations fixed by the

Suits in Admiralty Act but within the six years allowed by the New York statute. § 48, Civil Practice Act. Defendant removed the suits to the District Court for the Southern District of New York where they were consolidated. The case was tried by the court without a jury upon the complaints and a stipulation which provided that defendant should be deemed by appropriate pleadings to have raised the objection that the Suits in Admiralty Act affords an exclusive remedy for all causes of action for which a libel in admiralty may be filed thereunder. The court held that the remedy provided by the Act is exclusive and dismissed the case for want of jurisdiction. 30 F. (2d) 946. Plaintiff appealed to the Circuit Court of Appeals for the Second Circuit. We granted this writ before the determination of the case in that court.

In each of these cases there is involved the question whether the Suits in Admiralty Act excludes the remedy invoked by plaintiff.

Section 1, in view of the provision made for libel in personam, prevents the arrest or seizure by judicial process of any vessel owned by, in the possession of or operated by or for the United States or any corporation in which the United States or its representatives own the entire outstanding capital stock. Section 2 declares that, in cases where if such vessel were privately owned or operated a proceeding in admiralty could be maintained "at the time of the commencement of the action herein provided for", a libel *in personam* may be brought against the United States or against such corporation, provided that such vessel is employed as a merchant vessel. The pertinent provisions of the Act are printed in the margin of our opinion in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, 209, *et seq.*

Prior to the passage of the Act, merchant vessels of the United States were subject to seizure. §9, Shipping Act, September 7, 1916, 39 Stat. 730. *The Lake Monroe,* 250 U. S. 246. And the Fleet Corporation was liable to be sued in state or federal courts on causes of action arising out of the operation of such ships. Cf. *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549. The Act relieved the United States of the inconvenience resulting from such seizures and gave remedy by libel *in personam* against the United States and such corporations. *Blamberg Bros.* v. *United States,*

260 U. S. 452, 458. But that is not its only purpose. It authorizes libel *in personam* where there is nothing on which recovery *in rem* could be had. *Eastern Transp. Co.* v. *United States*, 272 U. S. 675. And it furnishes the exclusive remedy in admiralty against the United States and such corporations on maritime causes of action arising out of the possession and operation of merchant vessels. In *Fleet Corporation* v. *Rosenberg Bros., supra*, we said (p. 213):

> "It provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the judgments against the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other Acts. In view of these provisions of the Act we cannot doubt that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels. And nothing in its legislative history indicates a different purpose. It follows that after the passage of the Act no libel in admiralty could be maintained against the United States or the corporations on such causes of action except in accordance with its provisions . . ."

On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions. § 8, Suits in Admiralty Act. 46 U. S. C., § 748. Cf. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387.

The analysis of the Act and the reasons on which rests our decision in *Fleet Corporation* v. *Rosenberg Bros.* apply here. Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the

Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it. As shown above, § 2 authorizes a libel *in personam* against the United States or against the Fleet Corporation in each of these cases. It follows that on disclosure—whether by pleading or proof—of the facts aforesaid, the District Court should have dismissed each case for lack of jurisdiction.

Judgments in Nos. 5, 32 and 56 reversed and causes remanded with directions to dismiss.

Judgment in No. 123 affirmed.

A new copy.

Test:

Clerk, Supreme Court, U. S.